93-258

No. _____

Supreme Court, U.S.
FILED
AUG 16 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

DR. PATRICIA SCHLOESSER,

Petitioner,

vs.

THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and DR. STANLEY C. GRANT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Legal Printing Company, Inc. 913/631-3464

87 pp

QUESTIONS PRESENTED

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT EXCEEDED THE PROPER SCOPE OF APPELLATE REVIEW OF A JUDGMENT ENTERED ON A JURY VERDICT WHEN IT IMPROPERLY REVIEWED AND REVERSED THE DISTRICT COURT'S DENIAL OF DEFENDANTS' SUMMARY JUDGMENT MOTION.

II. IN LIGHT OF CONFLICTING LAW AMONG THE CIRCUITS AND THE NEED FOR UNIFORMITY AMONG THE CIRCUITS IN THE APPLICATION OF RULES CONTROLLING FEDERAL LIMITATIONS PERIODS, WHAT IS THE CORRECT STANDARD FOR DETERMINING WHETHER AN EMPLOYER IS EQUITABLY ESTOPPED FROM ASSERTING THAT AN EMPLOYEE'S CLAIM IS TIME-BARRED PURSUANT TO 29 U.S.C. §626(d).

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Statutes and Regulations 2

Statement 2

Federal Jurisdiction 6

Reasons for Granting Certiorari 7

Appendix 1a

TABLES OF AUTHORITIES

Page

CASES:

Applied Genetics v. First Affiliated Securities,
912 F.2d 1238 (10th Cir. 1990) 10

Blumberg v. HCA Management Co., Inc.,
848 F.2d 642, 645 (5th Cir. 1988) 17, 18, 25

Bottineau Farmers Elevator v. Woodward-Clyde Consultants,
963 F.2d 1064 (8th Cir. 1992) 10

Boyles Galvanizing & Plating Co. v. Hartford Acc. & Ind. Co.,
372 F.2d 310 (10th Cir. 1967) 8

Byrd v. Roadway Express, Inc.,
687 F.2d 85 (5th Cir. 1982) 13

Cada v. Baxter Healthcare Corp.,
920 F.2d 446, 452 (7th Cir. 1990) 22, 23, 24, 26

Carland v. Metropolitan Life Ins. Co.,
935 F.2d 1114, 1118 (10th Cir. 1991) 11

Celotex v. Catrett,
477 U.S. 317, 324 (1986) 7

Cerbone v. International Ladies Garment Workers' Union,
768 F.2d 45 (2nd Cir. 1985) 24, 25, 26, 27

Clark v. Resistoflex Co., Div. of Unidynamics,
854 F.2d 762, 769 (5th Cir. 1988) 18, 27

Cocke v. Merrill Lynch & Co., Inc.
817 F.2d 1559 (11th Cir. 1987) 25

Dartt v. Shell Oil Co.,
539 F.2d 1256 (10th Cir. 1976) 18, 19, 20, 21

TABLES OF AUTHORITIES

Page

Equal Employment, Etc. v. Southwest Tex. Methodist,
606 F.2d 63 (5th Cir. 1979) 12, 13

English v. Pabst Brewing Co.,
828 F.2d 1047 (4th Cir. 1987) 25, 26

Estate Counseling Service v. Merrill Lynch, Pierce, etc.,
303 F.2d 527 (10th Cir. 1962) 10

Exnicious v. United States,
563 F.2d 418 (10th Cir. 1977) 11

Gifford v. Atchison, Topeka and Santa Fe Ry. Co.,
685 F.2d 1149 (9th Cir. 1982) 13

Glaros v. H.H. Robertson Co.,
797 F.2d 1564 (Fed. Cir. 1986) *cert. dismissed*,
479, U.S. 1072 (1987) 8, 9

Grubb v. Federael Deposit Ins. Corp.,
868 F.2d 1151 (10th Cir. 1989) 9, 10

Holley v. Northrop Worldwide Aircraft Services,
835 F.2d 1375 (11th Cir. 1988) 8

Jarrett v. Epperly,
896 F.2d 1013 (6th Cir. 1990) 8, 9

Kale v. Combined Ins. Co. of America,
861 F.2d 746 (1st Cir. 1988) 23

Lindley v. Amoco Production Co.,
639 F.2d 671 (10th Cir. 1981) 10

Locricchio v. Legal Services Corp.,
833 F.2d 1352 (9th Cir. 1987) 8, 9

TABLES OF AUTHORITIES

Page

Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984) 16, 18, 19, 20, 21, 25, 26

Meyer v. Riegel Products Corporation, 720 F.2d 303 (3rd Cir. 1983) 20, 26

Murray v. Mount Pleasant Independent School Dist., 754 F. Supp. 535 (E.D. Tex. 1990) 12, 13

Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981) 23

O'Malley v. GTE Service Corp., 758 F.2d 818 (8th Cir. 1985) 25, 27

Placid Oil Co. v. Ashland Oil, Inc., 792 F.2d 1127 (Em.App. 1986) 10

Savarin Corp. v. National Bank of Pakistan, 447 F.2d 727 (2d Cir. 1971) 8

Schmidt v. Farm Credit Services, 977 F.2d 511 (10th Cir. 1992) 10

Senza-Gel Corp. v. Seiffhart, 803 F.2d 661 (Fed. Cir. 1986) 8

Stark v. Dynascan Corp., 903 F.2d 549, 551 (7th Cir. 1990) 24, 27

Stevens v. Barnard, 512 F.2d 876 (10th Cir. 1975) 10

Switzerland Cheese Assoc. v. Horne's Market, 385 U.S. 23 (1966) 8

TABLES OF AUTHORITIES

Page

Whalen v. Unit Rig. Inc.,
974 F.2d 1248 (10th Cir. 1992) 9, 10

STATUTES:

28 U.S.C. § 1254(1)(Supp. 1993) 2, 7

28 U.S.C. §§ 1331 6

28 U.S.C. §§ 1343(4) 6

29 U.S.C. § 621 6

29 U.S.C. § 626 . . . . . i, 2, 6, 15

29 U.S.C. § 1291 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

On June 4, 1991, the United States District Court for the District of Kansas (the "District Court") entered its Memorandum and Order denying Respondents' Motion for Summary Judgment and Motion for Partial Summary Judgment. On July 3, 1991, after a full trial on the merits, the jury entered its Verdict finding for Petitioner Dr. Patricia Schloesser ("Dr. Schloesser") on the issue of equitable estoppel as well as her demotion claim. On November 29, 1991, the District Court denied Respondents' Motions for Judgment Notwithstanding the Verdict and Motion to Amend the Judgment. On April 12, 1993, the United States Court of

Appeals for the Tenth Circuit (the "Court of Appeals") entered its Order and Judgment reversing the District Court's denial of Respondents' Motion for Summary Judgment. On April 26, 1993, a Petition for Rehearing and Suggestions for Rehearing en banc were filed by Dr. Schloesser pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rules 35 and 40 of the Tenth Circuit, respectively. On May 17, 1993, the United States Court of Appeals for the Tenth Circuit entered an order denying Petitioner's Petition for Rehearing and Suggestions for Rehearing en banc. The foregoing opinions are set forth in the Appendix at 1a through 51a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) (Supp. 1993) which permits review of cases in the United States Courts of Appeals by Writ of Certiorari which may be granted by this Court to any party after rendition of the judgment or decree.

STATUTES AND REGULATIONS

Statutes:

1. 29 U.S.C. § 626 . . . . . See Appendix, 42a

STATEMENT

In this case, the Kansas Department of Health and Environment ("KDHE"), Defendant and Respondent argued in a Motion for Summary Judgment that the claims of Petitioner, Dr. Patricia Schloesser, for age discrimination should be dismissed because Dr. Schloesser did not make the

claim within 300 days of being told that her job was being changed from the Director of the Division of Health to a new position. The District Court denied Respondent's Motion for Summary Judgment, stating that "[f]rom a review of the record in this case, we conclude that a question of fact exists concerning whether Defendant Dr. Grant actively misled Plaintiff and lulled Plaintiff into inaction by his conduct at the May 2, 1988 meeting." (Appendix at 11a) A full trial then took place on the merits of the above mentioned issue, among others.

A jury instruction was given on the issue of equitable estoppel. Respondents did not object to such instruction. The jury determined:

> [D]efendant actively misled plaintiff by misrepresentation or concealment and thereby caused or induced plaintiff to refrain from filing an administrative charge within 300 days of her demotion.

(Appendix at 17a) The jury further found in favor of Petitioner on her age discrimination claim for the demotion and awarded her damages.

The Respondents did not appeal the finding of age discrimination. However, the Respondents did appeal, among other matters, the District Court's denial of the Motion for Summary Judgment. The Tenth Circuit Court of Appeals, in an unusual decision, reversed the denial of the Summary Judgment Motion, thereby substituting itself as the trier of fact.

Some of the material facts in this case were substantially in dispute. Certainly, it was undisputed that Dr. Patricia Schloesser was employed by the Kansas Department

of Health and Environment ("KDHE") in a number of capacities from 1952 to 1971 and from 1974 to 1989 and had basically spent her working life as a medical doctor working for the KDHE. (Appendix at 36a) Further, it was undisputed that Governor Mike Hayden appointed Dr. Stanley Grant as Secretary of the KDHE and on August 18, 1987, Dr. Grant appointed Petitioner as Director of the Division of Health. (Appendix at 37a, 50a) It was undisputed that Dr. Grant and Dr. Schloesser met with Dr. Schloesser's attorney on May 2, 1988 and discussed Petitioner's reassignment to a new position, although nearly everything else about the meeting, including the content and the intent of the meeting, was in dispute. (Appendix at 37a, 43a, 44a, 49a)

Dr. Schloesser contended that Dr. Grant denied at the meeting that he was changing Petitioner's job because of any sex or age discrimination. (Appendix at 40a, 43a, 44a) She also contended that Dr. Grant informed her that he was not discharging her, but was merely filling a newly created position, that of liaison officer between the KDHE and the federal government. (Appendix at 37a) It was her contention that Dr. Grant expressed his intention to develop the new position into an "important" one for the KDHE. (Appendix at 37a, 47a) She also contended that Dr. Grant assured her that she would receive the necessary clerical and support staff to perform her job. (Appendix at 37a)

The Respondent Dr. Grant to the contrary contended that he transferred Petitioner to the Deputy Director position on a temporary or conditional basis. He contended that he told her that he would evaluate the need for the position after one year and that he characterized the new position as a "trial

balloon." (Appendix at 37a, 38a) Petitioner, however, absolutely denied that Respondent Dr. Grant made any such representations and denied that there were any such conditions on her job. (Appendix at 38a)

Although Dr. Grant purported to provide an alternative by which Dr. Schloesser could stay on the job she held for 35 years, Dr. Grant was misleading Petitioner and her attorney. The motivation and intent of Respondent Dr. Grant's offer of the new "important" position was suspect. Petitioner offered evidence that Respondent Dr. Grant had, unbeknownst to her, brought two evaluations to the May 2, 1988 meeting, but he only presented the "satisfactory" one. The "unsatisfactory" performance evaluation was not shown to Petitioner and her attorney. (Appendix at 37a, 50a) Petitioner contended that such evidence indicated the true intent of Respondents' action toward her and the lack of credibility of Respondent Dr. Grant's representations.

Many statements and actions by the Respondents were used to cover up the intent and motive of Respondents in reassigning Dr. Schloesser to a new work position. Petitioner contended that, in response to Respondent Dr. Grant's request, she submitted a position description to Dr. Grant for the newly created position, but such position description was never approved in accordance with KDHE policy and Dr. Schloesser contended that Dr. Grant never discussed with her the position description or her new duties and responsibilities. (Appendix at 38a) Petitioner contended that despite her request to be included in organizational charts, her name was excluded from charts published in October, 1988 and in February and May of 1989. (Appendix at 38a, 45a, 45a)

Although Respondents argued that Petitioner should have known her position, Petitioner contended that she was never given a truthful description of her new position.

After the new, much younger director, Dr. Charles Konigsberg, was hired, Petitioner contended that she was also deprived of secretary and clerical assistance beginning after Dr. Konigsberg arrived in October, 1988. (Appendix at 38a, 51a) Petitioner also contended that her office was moved while she was away on an out-of-state trip in late September 1988 to an inconvenient, much inferior office. (Appendix at 39a) Respondents disputed these contentions, but such contentions, among others, were made by Petitioner to show that Respondents never really intended her to succeed in a new, "important" position.

On May 9, 1989, one month after Petitioner's 65th birthday, Respondent Dr. Grant informed her that her position was no longer needed and that she would be terminated with loss of benefits unless she retired from her service with the state. Petitioner was compelled to submit a forced retirement, effective June 17, 1989. (Appendix at 39a) Plaintiff filed charges of discrimination against the KDHE and the Respondent Dr. Grant with the Equal Employment Opportunity Commission ("EEOC") on June 21, 1989. (Appendix at 41a)

FEDERAL JURISDICTION

The present case involves an action under the ADEA, 29 U.S.C. §621, et seq. brought in the District Court for legal and equitable relief. The statutory bases for jurisdiction are 28 U.S.C. §§1331, 1343(4) and 29 U.S.C. §626. The

appeal to the United States Court of Appeals for the Tenth Circuit was made pursuant to 29 U.S.C. §1291.

This Petition is filed pursuant to 28 U.S.C. §1254(1), whereby cases in the United States Courts of Appeals may be reviewed by the United States Supreme Court by Writ of Certiorari granted upon the petition of any party to any civil case, before or after rendition of the judgment or decree. The Court of Appeals' Order and Judgment was filed on April 12, 1993. The Petitioner's Petition for Rehearing and Suggestions for Rehearing en banc were denied on May 17, 1993. The present petition is timely in accordance with the rules of this Court. S. Ct. Rule 13.4.

REASONS FOR GRANTING CERTIORARI

I. The United States Court of Appeals for the Tenth Circuit Exceeded the Proper Scope of Appellate Review When it Improperly Reviewed and Reversed the District Court's Denial of Respondents' Motion for Summary Judgment.

A. The Court of Appeals Improperly Reversed the Denial of Summary Judgment Motion

This case does not involve the usual review of the granting of a summary judgment motion to a defendant where the plaintiff must show that material facts were in dispute. Such cases have been dealt with by this Court and clear guidance has been given as to the standard for review. Celotex Corporation v. Catrett, 477 U.S. 317 (1986).

Rather, in this case a jury considered the disputed facts and found for the plaintiff on the disputed facts. The Court of Appeals totally disregarded the jury's determination of the facts and substituted itself as the factfinder.

When the District Court found that factual disputes existed, which warranted a full trial as to the equitable estoppel issue, and the jury resolved those factual disputes, the denial of the summary judgment motion should not have been subject to appeal.[1]

Denial of a summary judgment motion is not a judgment from which an appeal can be taken. It is an interlocutory order which decides nothing more than that a trial should be held. Once a trial has been held, the "order" becomes moot. As the court in Glaros v. H.H. Robertson Co., 797 F.2d 1564 (Fed. Cir. 1986), *cert. dismissed,* 479 U.S. 1072 (1987), stated, in refusing to review a denial of a partial summary judgment motion:

> An order denying a motion for partial summary judgment . . . is merely a judge's determination that genuine issues of material fact exist. It is not a judgment, and does not foreclose trial on the issues on which summary judgment was sought. It "does not settle or even tentatively decide anything about the merits of the claim." Denial of a summary judgment "is strictly a pretrial order that decides only one thing--that the case should go to trial," i.e., that the claim remains pending for trial. "An order denying a

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[1] Switzerland Cheese Assoc. v. Horne's Market, 385 U.S. 23, (1966); Locricchio v. Legal Services Corp., 833 F.2d 1352 (9th Cir. 1987); Jarrett v. Epperly, 896 F.2d 1013 (6th Cir. 1990); Glaros v. H.H. Robertson Co., 797 F.2d 1564 (Fed. Cir. 1986); Boyles Galvanizing & Plating Co. v. Hartford Acc. & Ind. Co., 372 F.2d 310 (10th Cir. 1967); Holley v. Northrop Worldwide Aircraft Services, Inc., 835 F.2d 1375 (11th Cir. 1988); Savarin Corp. v. National Bank of Pakistan, 447 F.2d 727 (2d Cir. 1971); Senza-Gel Corp. v. Seiffhart, 803 F.2d 661 (Fed. Cir. 1986).

> motion for summary judgment is interlocutory, non-final, and non-appealable."

Id. at 1573 (citations omitted).

Appellate review of a denial of a Motion for Summary Judgment in a case such as this disregards the full evidentiary record of the trial in favor of preliminary information which is by its nature limited and incomplete. Policy favors deference to the full record of the case:

> To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice is arguably greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court's review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial. After considerable research, we have found no case in which a jury verdict was overturned because summary judgment had been improperly denied.

Locricchio v. Legal Services Corp., 833 F.2d 1352, 1359 (9th Cir. 1987); see also, Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990).

The Court of Appeals should not have sustained Respondents' appeal from the District Court's denial of Respondents' Motion for Summary Judgment. The only appealable judgment on the issue of whether Petitioner's claim was time-barred, was the judgment rendered by the jury after a full trial on the merits, or review of the denial of the motion for judgment as a matter of law. See Whalen v. Unit Rig. Inc., 974 F.2d 1248 (10th Cir. 1992); Grubb v.

Federal Deposit Ins. Corp., 868 F.2d 1151 (10th Cir. 1989). The Court of Appeals erred in sustaining Respondents' appeal and this error resulted in the violation of well-established precedent by this Court and the rule followed by the majority of Circuit Courts.[2]

B. The Court of Appeals Misapplied the Standard of Appellate Review of Grants of Motions for Summary Judgment

Not only did the Court of Appeals improperly reverse the denial of the summary judgment motion, it also misapplied the standards of appellate review of grants of Motions for Summary Judgment. Under the standard set forth in Applied Genetics v. First Affiliated Securities, 912 F.2d 1238 (10th Cir. 1990), a court must read the record in the light most favorable to the party who defends against a Motion for Summary Judgment. Lindley v. Amoco Production Co., 639 F.2d 671 (10th Cir. 1981). In addition, a court must take as true the allegations of the party opposing summary judgment. Estate Counseling Service, Inc. v. Merrill Lynch, Etc., 303 F.2d 527 (10th Cir. 1962). A court must give the benefit of the doubt to the party opposing summary judgment when his assertions conflict with those of the movant. Stevens v. Barnard, 512 F.2d 876 (10th Cir. 1975).

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[2] See Footnote 1; the rule has also been recognized in Bottineau Farmers Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064 (8th Cir. 1992); Schmidt v. Farm Credit Services, 977 F.2d 511 (10th Cir. 1992); Whalen v. Unit Rig, Inc., 974 F.2d 1248 (10th Cir. 1992); Placid Oil Co. v. Ashland Oil, Inc., 792 F.2d 1127 (Em. App. 1986).

Further, the appellate court is limited in its review in two ways: First, it can consider only those matters that were before the trial court at the time of the summary judgment motion. Carland v. Metropolitan Life Ins. Co., 935 F.2d 1114, 1118 (10th Cir. 1991). The parties cannot add exhibits, depositions, or affidavits to support their position, nor can they advance new theories or raise new issues in order to secure a reversal of the lower court's determination. Secondly, the appellate court cannot consider evidence introduced at the trial level after the denial of the original summary judgment motion. Id. The reviewing court may only determine whether a genuine issue exists and whether the law was applied correctly. See Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977).

The Court of Appeals in this case misapplied the standard of review in the following respects: (1) it substituted itself as the trier of fact; and (2) it misunderstood and misapplied controverted facts.

1. The Court of Appeals Substituted Itself As the Trier of Fact.

The Court of Appeals substituted itself as the trier of fact. The Court of Appeals cited the same standards and cases for the application of equitable estoppel as were used by the District Court. However, the Court of Appeals ruled that Petitioner did not point to any action taken by Respondents to mislead her as to any of the pertinent facts or "trick" her into allowing the limitations period to pass. (Appendix at 32a)

Petitioner raised a disputed issue as to a material fact when she asserted that the creation of a new job which she perceived to be an "important one," and which

Respondents assured, both to Petitioner and others, was an "important" one, was in reality a dead-end street where she did not receive the support promised. Dr. Schloesser contended that Respondents had denied any age discrimination and had portrayed her new job as an "important" job for KDHE, with the Respondents' full support, when in fact the concealment of the "unsatisfactory" review, the subsequent failure of the Respondents to fulfill its promises of support, the subsequent misleading representations and concealment of its plans concerning the job, and other facts established that Respondents never intended the job to be "important." The Court of Appeals substituted its own judgment, concluding that at the time of Petitioner's "demotion" she "must have known" of the discrimination (Appendix at 32a).

The federal courts have recognized the importance of jury trials in employment discrimination cases, noting that summary judgment is not favored as a tool for resolving claims of employment discrimination which necessarily involve questions of motivation and intent. Equal Employment Etc. v. Southwest Tex Methodist, 606 F.2d 63 (5th Cir. 1979); Murray v. Mount Pleasant Independent School Dist., 754 F. Supp. 535 (E.D. Tex. 1990).

Although the Court of Appeals recognized that "the motivation behind the activity [surrounding the May 2, 1988 meeting] that followed is in dispute," it failed to consider the subjective fact questions regarding Respondents' motivation and intent (Appendix at 30a). The Court of Appeals failed to recognize that determinations of motive and intent are not proper subjects for disposition by summary

judgment.[3] Petitioner contended, in response to the summary judgment motion, that the creation of a new job, albeit at a lower classification, led her to believe that Respondents did not have a discriminatory intent. In its ruling, the Court of Appeals chose either to ignore or disbelieve the facts presented by Petitioner.

2. The Court of Appeals Misunderstood and Misapplied Controverted Facts.

In its decision, the Court of Appeals stated that Petitioner "immediately suffered the consequences of lower pay, a less desirable office space, less administrative authority and diminished support staff assistance." (Appendix at 31a) From these "facts," the Court of Appeals reasoned that Petitioner knew or should have known of the discrimination. This fact finding by the Court of Appeals was incorrect.

Contrary to the Court of Appeals' determination, Dr. Schloesser did not "immediately" suffer "lower pay". Petitioner received slightly reduced pay, but not until August, 1988. There was no mention whatsoever in the summary judgment facts of a reduced salary for her as Deputy Director. Rather than considering the facts actually before the District Court on summary judgment. The court relied on an assertion made by Respondents in their appellate argument. The only discussion of petitioner's salary at trial

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[3] See, e.g., Equal Employment, Etc. v. Southwest Tex. Methodist, 606 F.2d 63 (5th Cir. 1979); Byrd v. Roadway Express, Inc., 687 F.2d 85 (5th Cir. 1982); Murray v. Mount Pleasant Independent School Dist., 754 F. Supp. 535 (D.C. Tex. 1990); Gifford v. Atchison, Topeka and Santa Fe Ry. Co., 685 F.2d 1149 (9th Cir. 1982).

was the evidence that her $65,000.00 salary at her new position was the same as Respondent Dr. Grant's. (Appendix at 52a)

Contrary to the statement made by the Court of Appeals, Petitioner did not "immediately" receive "less desirable office space." Her office was not changed until late September of 1988. (Appendix at 39a) No mention of reduced pay or "less desirable office space" was made at the May 2, 1988 meeting.

Contrary to the statement of the Court of Appeals, Petitioner did not "immediately" have "less authority" in most areas she worked. It was emphasized in the summary judgment pleadings that Respondents withheld the extent of Petitioner's "authority" as she did not appear on organizational charts until March of 1989. (Appendix at 38a). Furthermore, Respondents never told Petitioner that the memos she drafted describing her job duties and responsibilities were incorrect (Appendix at 38a). Petitioner's title was not reduced until it appeared on an organizational chart on March 27, 1989 when the title was "arbitrarily reduced to Assistant Director for Federal and State Relations." (Appendix at 38a).

Petitioner also did not "immediately" have "diminished support staff assistance." Petitioner's secretary was not taken from her until after Dr. Konigsberg became Director of the Division in October, 1988. (Appendix at 38a). Rather, Respondent Dr. Grant assured Petitioner at the May 2 meeting that she would have "support" and Dr. Konigsberg testified that Petitioner did not lose her secretarial support. (Appendix at 37a).

As shown above by this Court of Appeal's inaccurate review of the facts, when an appellate court attempts to

replace the factfinder, it can easily take facts out of context and misapply them to the case.

C. Conclusion

The Court of Appeals should not have reversed based upon the District Court's denial of Respondents' Motion for Summary Judgment. Notwithstanding the foregoing, even if Respondents could have appealed the District Court's denial of their Motion for Summary Judgment, the Court of Appeals erred as: (1) it substituted itself as the trier of fact, and (2) it misapplied and misconstrued facts.

Dr. Schloesser's evidence showed that Respondents misled her as to its actual intent in changing her job classification. The District Court did not substitute itself as the trier of fact or try to weigh the evidence or pass on the credibility of the witnesses It let the jury determine those issues. The Court of Appeals, though, said it could better determine whether Dr. Schloesser "should have known" that she was being discriminated against, without ever having seen Respondent Dr. Grant or Petitioner or any of the other witnesses who testified with regard to these matters. To allow the Tenth Circuit to reverse the jury's findings undercuts the traditional function of the jury to determine the facts.

II. In Light of Conflicting Law Among the Federal Circuits and the Need for Uniformity Among the Circuits in the Interpretation of Rules Concerning Federal Limitations Periods, the United States Supreme Court Should Apply the Standard to Determine Whether an Employer is Equitably Estopped from Asserting that an Employee's Claim is Time-Barred Pursuant to 29 U.S.C. §626(d)

Which has been Stated in the Third, Ninth and Seventh Circuits, and Previously Recognized in the Tenth Circuit.

The instant decision, in light of the conflicting decisions in other federal circuits, presents an important question of federal law which has not been settled by this Court. The circuits are unevenly stating and applying the law regarding equitable modification of the ADEA limitations period. More specifically, the issues in this case raise important questions involving federal law as to the distinction between the doctrines of equitable estoppel and equitable tolling, and the appropriate circumstances under which equitable modification is permitted. The United States Supreme Court in this case can apply standards with regard to equitable estopple and equitable tolling which will guide federal courts, employers and employees in their decisions.

A. The Tenth Circuit In Its Decision Ignored Existing Precedent.

The Court of Appeals correctly stated the Tenth Circuit decisions holding that an employer may be equitably estopped from asserting a defense based on a limitations period if the employer has "actively misled" plaintiff, or if a plaintiff has been "lulled into inaction" by her employer, state or federal agencies, or the courts (Appendix at 31a, p.4 *citing* Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984)).

While the Court of Appeals correctly stated the elements of equitable estoppel previously recognized in the Tenth Circuit, and a majority of other circuits, it did not apply those elements in this case. Instead, it focused solely on what it determined was Petitioner's knowledge or constructive knowledge of the discrimination at the time of

Respondents' discriminatory act, stating that when Petitioner was demoted "facts that would support a cause of action [were] or [should have been] apparent". (Appendix at 32a, p.4 *citing* Blumberg v. HCA Management Co. Inc., 848 F.2d 642, 645 (5th Cir. 1988)).[4] The balance of the Court of Appeal's discussion was conclusory or based on its determination of controverted facts previously considered by the jury.

By its reliance on Blumberg, the Court of Appeals adopted the more stringent standard used by the Fifth Circuit for reviewing of cases involving equitable tolling rather than equitable estoppel. Thus, it only considered when Petitioner's action "accrued," not whether wrongful acts by Respondents' "actively misled" or "lulled [Petitioner] into inaction" at the time of or subsequent to the discriminatory act.

The Court of Appeals abrogated the jury's right to determine the facts under the previous Tenth Circuit standard

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[4] The Fifth Circuit in Blumberg v. HCA Management Company, Inc., 848 F.2d 642 (5th Cir. 1988) imposed a much more stringent requirement to determine whether the ADEA limitations period has been tolled. It is important to note, however, that Blumberg dealt with the issue of equitable tolling, as opposed to equitable estoppel. In dealing with the equitable tolling issue, the Court stated that

> It is not necessary for a claimant to know all of the evidence for her to file a claim or to begin the 180-day period . . . . The time begins when facts that would support a cause of action are or should be apparent . . . a plaintiff who is aware that she is being replaced in a position she believes she is able to handle by a person outside the protected age group knows enough to support filing a claim.

Id. at 645.

given to them by instruction. (Appendix at 17a) The Court of Appeals stated that Petitioner had "ample notice that possible discrimination based on age had resulted in her demotion." (Appendix at 31a). As more fully discussed below, the standard for review of cases involving equitable tolling utilized by the Court of Appeals in this case conflicts with the standard previously set forth by the Tenth Circuit in cases involving equitable estoppel. See Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1989); Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976).

Applying the reasoning and standard set forth in Blumberg to an equitable estoppel claim is inappropriate and also in contravention of the purposes of the ADEA as set forth in Dartt. Blumberg establishes a standard to determine when an ADEA cause of action has accrued, as opposed to determining whether, once the limitations period has begun, it is subject to equitable modification. Further, it was improper for the Court of Appeals to incorporate an equitable tolling standard based on a notice-type requirement, rather than applying the appropriate equitable estoppel standard which focuses on the employer's acts and the reasonable reliance by the Petitioner on such acts[5].

The Court of Appeals' holding in this case results in a standard for equitable estoppel that undermines the basic humanitarian purposes of the ADEA, especially when employers have not suffered from the delay. It opens the

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[5] For a Fifth Circuit decision involving "equitable estoppel," see Clark v. Resistoflex Co., Div. of Unidynamics, 854 F.2d 762, 769 (5th Cir. 1988) (doctrine of equitable estoppel applicable when employee's untimeliness of filing charge results from either employer's "deliberate design " to delay the filing or actions that the employer "should unmistakenly have understood" would result in the employee's delay).

gates for employer practices which would potentially prevent claimants access to the courts or would force claimants to institute age discrimination suits based on mere suspicion of misconduct. Claimants, like Petitioner, would no longer be able to rely on employers' assertions that a particular practice is not discriminatory, or that their job change is not discriminatory. Any type of job change which could be construed as a "demotion" or lesser job, regardless of surrounding circumstances, would be considered an action setting in motion the time clock for filing an ADEA action. Thus, the settlement and conciliation components of the ADEA would clearly be frustrated. See Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976).

B. The Previous Tenth Circuit Standard.

The previous Tenth Circuit standard for equitable estoppel cases is fairly represented in Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984). In Martinez, the court stated:

> Equitable tolling may be appropriate where a plaintiff has been "lulled into inaction by her past employer, state or federal agencies, or the courts." Likewise, if a plaintiff is "actively misled," or "has in some extra-ordinary way been prevented from asserting his or her rights," we will permit tolling of the limitations period.

Id. at 1110 (citations omitted).[6]

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[6] It is apparent that Martinez fuses the doctrines of equitable estoppel and equitable tolling; however, it is Petitioner's contention that if a plaintiff in an ADEA action has been "actively misled" or "lulled into inaction" by her employer, thus resulting in the plaintiff's failure to file a timely ADEA charge with the EEOC, then the employer should be

The reasoning in Dartt v. Shell Oil Co., 539 F.2d 1256, 1259 (10th Cir. 1976), affirmed by an evenly divided court, 434 U.S. 99 (1977) is also instructive in defining the scope of the appropriate standard to be utilized in determining the applicability of equitable estoppel. Though the court in Dartt was dealing with an issue of equitable tolling of the ADEA filing period, it did recognize that the ADEA limitations period for filing a claim was also subject to equitable estoppel. Id. at 1260-61. In Dartt, the Court of Appeals explained the rationale for allowing equitable modification of the limitations period in ADEA cases:

> The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment.

Dartt, 539 F.2d at 1260. The court in Dartt further noted that the two basic purposes behind the ADEA requirement that the employee give notice of intent to sue would not be undermined by allowing equitable tolling of the limitations period. Dartt, 539 F.2d at 1261. The two basic purposes

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equitably estopped from asserting a defense based on the limitations period. Nevertheless, the decision in Martinez exemplifies some of the confusion the federal circuits are presently experiencing concerning the law as to equitable modification of the ADEA limitations period.

The Third Circuit in Meyer v. Riegel Products Corporation, 720 F.2d 303 (3rd Cir. 1983) adopted the same standard as Martinez and, while dealing with an equitable estoppel claim, it nonetheless categorized plaintiff's claim as one for equitable tolling. Of further significance in Meyer is that the court concluded that plaintiff's lingering suspicion concerning his dismissal and his consultations with an attorney did not preclude the invocation of equitable tolling. Id. at 307.

behind the 180-day [or 300-day] notice requirement are: (1) to provide the Labor Department with an opportunity to achieve a conciliation of the complaint while the complaint is still fresh and (2) to give early notice to the employer of possible lawsuit, the latter promoting both the preservation of evidence and good faith negotiation on the part of employer during the conciliation period. Id.

Under the standard set forth in Martinez and Dartt, equitable estoppel in the instant case does not undermine the congressional purposes of the ADEA. The employer, at the time Petitioner filed her complaint, was not prejudiced because there were no alleged problems with the preservation of evidence or the good faith negotiations on the part of the employer during the conciliation period. After the filing of Petitioner's claim, Respondents had an opportunity to settle and correct the discriminatory action. Further, no claim as to stale evidence has been made by Respondents. Secondly, the EEOC, operating on behalf of the Labor Department, had an opportunity to achieve conciliation of the complaint while it was still fresh. As stated in Dartt, "this is not a case of a plaintiff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the de facto fulfillment of the main purposes of the act the time limitations period should be tolled until the filing of Petitioner's notice of intent to sue." Dartt, 539 F.2d at 1262.

Petitioner thus contends that the standard set forth in Martinez v. Orr, permitting equitable modification if Petitioner was "actively misled" or "lulled into inaction" by her employer's actions, coupled with the reasoning in Dartt, regarding the purposes of the ADEA, is the correct standard to be applied in ADEA equitable estoppel cases. Reliance by prospective claimants on their employers' actions should be

the key to the determination, while keeping with the basic congressional purposes behind the ADEA. Contrasted with the instant decision by the Court of Appeals, it is apparent that the standard advanced by Petitioner fulfills the basic humanitarian purposes of the ADEA, and preserves the integrity of the legislation.

C. Decisions in Other Circuits.

Rulings in other jurisdictions are also indicative of the confusion and conflict with the standard for modification of the ADEA limitations period based on equitable estoppel. While some circuits are clearly distinguishing between equitable estoppel and equitable tolling, and thereby using the appropriate standard, others continue to fuse the two doctrines or modify the appropriate standard. These practices have resulted in inconsistent modifications of the ADEA limitations period, as well as the frustration of the humanitarian goals behind the ADEA.

1. The Seventh Circuit.

The Seventh Circuit, in Cada v. Baxter Healthcare Corp., 920 F.2d 446 (7th Cir. 1990), provides a well-reasoned discussion of the distinctions between equitable estoppel and equitable tolling; the court also distinguishes between the accrual of the plaintiff's claim and the tolling of the statute of limitations, noting that equitable tolling and equitable estoppel can both toll the statute of limitations after

the accrual of a claim. Cada also sets forth the better standard to be applied in each instance[7].

Regarding the accrual of a plaintiff's claim, the court noted that the "discovery rule" postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when the plaintiff discovers she has been injured. Id. at 450. The court noted, however, that even after the plaintiff has discovered that she has been injured, equitable estoppel or equitable tolling are doctrines which may operate to toll the applicable statute of limitations. Id.

The court indicated that equitable estoppel comes into play if the defendant "takes active steps to prevent the plaintiff from suing on time." Id. Then, after noting that equitable estoppel is sometimes called "fraudulent concealment," the court stated:

> Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant - above and beyond the wrongdoing upon which the plaintiff's claim is founded - to prevent the plaintiff from suing in time.

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[7] Other circuits have imposed a standard similar to the one set forth by the Seventh Circuit in Cada include Kale v. Combined Ins. Co. of America, 861 F.2d 748 (1st Cir. 1988)(equitable estoppel available when employee aware of ADEA rights, but fails to file on time due to her reasonable reliance on her employer's misleading or confusing representations or conduct); Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981)(equitable estoppel focuses on defendant's actions; of critical importance is plaintiff's actual and reasonable reliance on defendant's conduct or representations and defendant's actual or constructive knowledge of deceptive nature of act; factfinder should also consider whether purposes of limitations period have been satisfied).

Id. at 451.

In contrast, equitable tolling permits a plaintiff to avoid the statute of limitations bar if, despite all due diligence, she is unable to obtain vital information bearing on the existence of her claim. Id. Recognizing the difficulty courts sometimes have in distinguishing the above-stated doctrines, the court stated:

> Equitable tolling is frequently confused both with fraudulent concealment on the one hand and with the discovery rule - governing, as we have seen, accrual - on the other. It differs from the former in that it does not assume a wrongful - or any - effort by the defendant to prevent the plaintiff from suing. It differs from the latter in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has began to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant.

Id. The court then noted that many cases, in the age discrimination field as in other areas, fuse the two doctrines, presumably inadvertently. Id. at 452, citing Stark v. Dynascan Corp., 902 F.2d 549, 551 (7th Cir. 1990)[8]; Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45 (2d Cir. 1985).

In the instant case, the Tenth Circuit Court of Appeals has improperly fused the doctrine of equitable

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[8] In Stark, the court incorrectly stated: "[t]o invoke equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge." Stark, 902 F.2d at 551 (emphasis added).

estoppel and the doctrine of equitable tolling. Clearly, when asserting equitable estoppel, it is immaterial whether plaintiff knew or should have known facts giving rise to an ADEA claim. The court should have focused on whether Respondent Dr. Grant's action, in creating a new and allegedly "important" job for Petitioner, "actively misled" or "lulled [Petitioner] into inaction." Martinez, 738 F.2d at 1110. Reliance on Blumberg was inappropriate because the Fifth Circuit decision involved equitable tolling, not equitable estoppel and did not involve a claim that Respondents had "actively misled" or "lulled [her] into inaction."

2. The Second Circuit.

In Cerbone v. International Ladies Garment Workers' Union, 768 F.2d 45 (2nd Cir. 1985), the court recognized that the doctrine of equitable estoppel is different from the doctrine of equitable tolling, but then did not clearly articulate the distinctions between the two doctrines[9]. The court stated:

> . . . equitable tolling might be applied to relieve a plaintiff who was "actively misled by his employer"

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[9] Decisions in other circuits are also misstating or misapplying the doctrines of equitable tolling and equitable estoppel. See English v. Pabst Brewing Co., 828 F.2d 1047 (4th Cir. 1987)(court confused the distinction between the two doctrines stating that both focus on the wrongful acts of the defendant); O'Malley v. GTE Service Corp., 758 F.2d 818 (8th Cir. 1985)(equitable estoppel requires "deliberate design" or conduct that employer "should unmistakably have understood could cause the employee to delay filing his charge"); Cocke v. Merrill Lynch & Co., Inc., 817 F.2d 1559 (11th Cir. 1987)(court seems to require misconduct or bad faith attributable to the employer to establish equitable estoppel).

> or who was "prevented in some extraordinary way from exercising his rights." We have noted that such an extraordinary circumstance might be presented "if the employee could show that it would have been impossible for a reasonably prudent person to learn that [an employment decision] was discriminatory."

Id. at 48-49 (citations omitted). The court in Cerbone noted that equitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing his lawsuit. Id. at 50. Cerbone fused the two doctrines by saying that equitable tolling differs from equitable estoppel only in that the plaintiff does not know he has a claim in the former case and does in the latter; in both cases, the defendant has taken steps to prevent the plaintiff from suing. Cerbone, however, is incorrect in its proposition that both doctrines are based on defendants' wrongful acts because only equitable estoppel focuses on the acts of defendants. Equitable tolling, on the other hand, focuses only on plaintiff's knowledge of the existence of a claim. See Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990).

D. Conclusion

It is apparent from these decisions that the federal circuits need guidance on when a defendant may be equitably estopped from raising a defense based on the ADEA limitations period. The Court of Appeals in this case has clearly confused equitable tolling and equitable estoppel. Other courts have also struggled in distinguishing between equitable tolling and equitable estoppel. See, e.g., Meyer, 720 F.2d 303; English, 828 F.2d 1047; Martinez, 738 F.2d

1107; Cerbone, 768 F.2d 45; Stark, 902 F.2d 549. Key phrases seem to be repeated in the standards utilized in the several circuits. Some federal circuits seem to utilize the "actively misled" or "lulled into inaction" standard. Other circuits emphasize the employee's reliance on the employer's acts.

In dealing with an equitable tolling case, the Fifth Circuit's reasoning as applied in this case imposes a more stringent standard without apparent regard for the purposes of the ADEA. As applied by the Cour tof Appeals, it prevents tolling if the employee knew or should have known of facts which give rise to a claim for discrimination under the ADEA. Other circuits present yet another modification of a standard to be applied to equitable estoppel cases, when they provide that, for equitable estoppel to apply, the employer must "unmistakably have understood [that his actions] could cause the employee to delay filing his charge." O'Malley, 758 F.2d at 822; Clark, 854 F.2d at 769. These decisions apparently require that the applicable standard should be considered from the point of view of the employer, without regard to the employee's reliance on the employer's actions.

For the foregoing reasons, Petitioner suggests that the Court, through this case, can resolve conflicting law between the circuits regarding when a defendant may be equitably estopped from raising a defense based on the ADEA limitations period. Petitioner suggests further that the better reasoned standard is the one applied by the Seventh, Ninth and Third Circuits as well as the previous Tenth Circuit Standard; that is, the trier of fact may determine whether an employee has been "actively mislead" or "lulled into inaction" by his or her employer. In the instant case, such standard was applied by the jury and the District Court.

Therefore, the ruling of the District Court and the determination of the jury should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DR. PATRICIA SCHLOESSER,	)	
	)	
Plaintiff,	)	
	)	CIVIL
vs.	)	ACTION
	)	No. 90-2029-V
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and STANLEY C. GRANT,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case comes before the court on defendants' Motion for Partial Summary Judgment (Doc. 63) and defendants' Motion for Summary Judgment (Doc. 92). Fed.R.Civ.P. 56(b). Both motions are now at issue. Taken as one, the motions are granted in part and denied in part.

Plaintiff, Dr. Patricia Schloesser, brought this employment discrimination action, claiming that, by demoting her and then terminating her employment, defendants, the Kansas Department of Health and Environment (KDHE) and Stanley C. Grant, had unlawfully discriminated against her on the basis of her sex, age, and handicap (cancer), and that they had unlawfully retaliated against her, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 et seq., the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Kansas Act Against Discrimination (KAAD), K.S.A. 44-1001 et seq. Defendants now contend, in the instant motions, that they are entitled to

summary judgment on all of plaintiff's claims and that this case should be dismissed accordingly.

I. SUMMARY JUDGMENT STANDARDS

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be discharged by "showing," that is, pointing out to the district court, that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, "a party opposing . . . may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id.

II. FACTUAL BACKGROUND

The pertinent uncontroverted facts, as established by the parties in accordance with D.Kan. Rule 206(c), appear as follows:

Plaintiff is a sixty-seven-year-old woman. She was employed by the KDHE in a number of capacities from 1952 to 1971 and from 1974 to 1989. The KDHE is a cabinet-level agency of the State of Kansas. It is administered by a

Secretary who is appointed by, and serves at the pleasure of, the Governor of Kansas. At the relevant times involved herein, defendant Grant was Secretary of the KDHE.

On June 18, 1987, Governor Mike Hayden appointed defendant Grant as Secretary of the KDHE. Governor Hayden specifically charged defendant Grant with "turning the agency around" in its management and direction. At the time that defendant Grant was appointed, the KDHE was organized into two major divisions: The Division of Health and the Division of the Environment. Each division was composed of a number of different bureaus.

On August 18, 1987, after making various inquiries and assessing the KDHE's needs, Secretary Grant appointed plaintiff as Director of the Division of Health and James Power, a sixty-year-old man, as Director of the Division of the Environment. Defendant Grant expected the directors to take charge of the respective divisions, to exhibit skill in handling the various bureaus, and to provide support for each bureau. Defendant grant also expected the directors to follow the agency's agenda and be "team players" for the KDHE. Plaintiff was aware of defendant Grant's expectations when she accepted the appointment.

Initially, the working relationship between plaintiff and defendant Grant was cordial and positive. However, after a period of time, defendant Grant became dissatisfied with plaintiff. Eventually, defendant Grant decided to replace plaintiff as Director of the Division of Health. On April 29, 1988, defendant Grant informed plaintiff that she was being removed from her position because she had exercised her own agenda and was not a "team player" for the KDHE. Defendant Grant proposed a follow-up meeting to discuss her removal.

On May 2, 1988, plaintiff and her attorney met with defendant Grant to discuss the particularities of her removal. During the meeting, plaintiff's attorney warned defendant Grant that it was illegal to "fire" a person on account of their age or sex. Defendant Grant assured plaintiff and her attorney that plaintiff's age and sex were not the reasons for his decision to replace her. He also informed plaintiff that he was not discharging her, but was merely demoting her to fill a newly created position, that of liaison officer between the KDHE and the federal government. Based on defendant Grant's representations, plaintiff accepted the demotion and the new position. Plaintiff did not file charges of discrimination against defendants at that time.

In July, 1988, plaintiff was diagnosed as having breast cancer. The KDHE allowed plaintiff to adjust her schedule to accommodate her treatments. It is not disputed that, during her illness, plaintiff continued to work full-time and maintained her previous levels of performance.

On October 11, 1988, Governor Hayden announced the appointment of Scott Morgan as Director of the Office of Federal Affairs (OFA). It was the responsibility of the OFA to act as liaison between all Kansas state agencies and the federal government. Morgan issued a directive requesting all state agencies, including the KDHE, to coordinate their contacts with the federal government through the OFA.

In early 1989, defendant Grant decided to eliminate plaintiff's KDHE liaison position. On June 7, 1989, defendant Grant informed plaintiff that he was eliminating her position because it duplicated the efforts of the OFA. Defendant Grant did not offer plaintiff another position within the KDHE. Consequently, plaintiff's employment with the KDHE ended. On June 29, 1989, plaintiff filed charges of discrimination against the KDHE and defendant Grant with

the Equal Employment Opportunity Commission (EEOC). On January 25, 1990, within ninety days of receiving notice of the right to sue, plaintiff filed the present action.

III. DISCUSSION

In the instant motions, defendants contend that they are entitled to summary judgment in this case on a number of grounds. For ease of discussion, we have divided defendants' contentions into three sections, as outlined below. First, defendant Grant contends that, because he has only been sued in his official capacity, the Eleventh Amendment bars plaintiff from suing him under both 42 U.S.C. § 1983 and the KAAD. He also argues that he is not amenable to suit under the ADEA. Second, the KDHE contends that the Eleventh Amendment prohibits plaintiff from bringing suit against it under the ADEA. Third, defendants contend that they are entitled to summary judgment regarding plaintiff's specific Title VII and ADEA claims, which we may enumerate as: (1) the May 2, 1988, demotion, (2) the June 17, 1989, termination, and (3) plaintiff's retaliation claims. We shall discuss each section separately.

A. Defendant Grant's Contentions

1. The 42 U.S.C. § 1983 Claims

Plaintiff claims that by demoting her and terminating her employment defendant Grant deprived her of her constitutional rights to due process and equal protection of the laws in violation of 42 U.S.C. § 1983. Defendant Grant contends that the court should dismiss plaintiff's section 1983 claims because the pretrial order discloses that he has only been sued in his official capacity. On that ground, he contends that plaintiff's section 1983 claims are barred by the

Eleventh Amendment. We agree with defendant Grant's contention.

The pretrial order of a case controls the course of the case and measures its dimensions. American Home Assur. Co. v. Cessna Aircraft Co., 551 F.2d 804, 806 (10th Cir. 1977); Fed.R.Civ.P. 16(e); D.Kan. Rule 213(c). Once a pretrial order has been entered in a case, it supersedes the pleadings and becomes the governing pattern of the suit. Hernandez v. Alexander, 671 F.2d 402, 407 (10th Cir. 1982). Claims contained only in the pleadings, but not in the pretrial order, are not properly presented to the court. Id.; Stafos v. Missouri P. R. Co., 367 F.2d 314, 319 (10th Cir. 1966).

On January 7, 1991, a pretrial order was entered in this case (Doc. 82). Construing the pretrial order liberally we are unable to conclude that plaintiff has alleged that defendant Grant performed any of the complained of acts in this individual capacity. Therefore, we are constrained to conclude that defendant Grant has only been sued in his official capacity as Secretary of the KDHE. Because a state official acting in his official capacity is not amenable to suit under section 1983, Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989), defendant Grant is entitled to summary judgment on plaintiff's section 1983 claims.

2. The KAAD Claim

In this case, plaintiff also asserts a pendent state law claim against defendant Grant, alleging that he eliminated her position and refused to offer her a new job with the KDHE because of her handicap (cancer) in violation of the Kansas Act Against Discrimination (KAAD), K.S.A. 44-1001 et seq. In his motion, defendant Grant contends that he is not

amenable to suit under the KAAD. We agree that plaintiff cannot sue defendant Grant under the KAAD in this case.

As stated above, defendant Grant has only been sued in his official capacity as secretary of the KDHE. A suit against a state official in his official capacity is not a suit against the official but rather a suit against the official's office. Brandon v. Holt, 469 U.S. 464, 471 (1985). As such it is no different from a suit against the state. See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985); Will, 491 U.S. at 71. The Eleventh Amendment prohibits a party from bringing a pendent state claim against a state in federal court. Pennhurst State School & Hospital v. Halderman (Pennhurst II), 465 U.S. 89, 119-21 (1984). It thus follows that the Eleventh Amendment also prohibits a party from bringing a pendent state claim in federal court against a state official acting in his official capacity. Id.; Will, 491 U.S. at 71. Accordingly, we conclude that defendant Grant is entitled to summary judgment on plaintiff's KAAD claims.

3. The ADEA Claims

Plaintiff also claims that defendant Grant demoted her and erminated her employment because of her age and retaliated against her employment because of her age and retaliated against her in violation of the ADEA. Defendant Grant contends that he is not an "employer" as defined by the ADEA, and is not amenable to suit under the ADEA. Judges in this district have considered this issue and have held that state officials are not "employers," as defined by the ADEA, and are thus not proper parties in an action brought under the ADEA. See Young v. Sedgwick County, 660 F. Supp. 918, 921 D.Kan. 1987); also, Ditch v. Board of County Commissioners, 650 F. Supp. 1245, 1251 (D. Kan. 1986).

In accordance with those decisions, defendant Grant is entitled to summary judgment on plaintiff's ADEA claims.

B. The KDHE and the ADEA

As stated above, plaintiff claims that she was discriminated against because of her age and retaliated against in violation of the ADEA. The KDHE, as a state agency, contends that the Eleventh Amendment prohibits plaintiff from bringing suit against it under the ADEA in federal court. In response, plaintiff argues that, because the ADEA was enacted pursuant to Congress' powers under section five of the Fourteenth Amendment, her claim is not barred by application of the Eleventh Amendment. We agree with plaintiff's contention.

The Eleventh Amendment bars private suits against the state and state agencies "seeking to impose liability which must be paid from public funds in the treasury." Edelman v. Jordan, 415 U.S. 651, 663 (1974). However, Eleventh Amendment immunity may be abrogated where Congress indicates an "unequivocal expression of congressional intent" to do so and authorizes such suits pursuant to section five of the Fourteenth Amendment. Pennhurst II, 465 U.S. at 99; Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Thus, the issue at bar presents two questions: (1) was the ADEA enacted pursuant to section five of the Fourteenth Amendments and (2) if so, did Congress intend that the ADEA abrogate the Eleventh Amendment sovereign immunity?

Although both the Supreme Court and the Tenth Circuit have declined to rule on the first issue, see EEOC v. Wyoming, 460 U.S. 226, 243 (1983) (because the Court found that the ADEA was a "valid exercise of Congress'

powers under the Commerce Clause," it did not reach the issue whether the ADEA could also have been validly enacted pursuant to section five of the Fourteenth Amendment) and EEOC v. Wyoming Retirement System, 771 F.2d 1425, 1428 (10th Cir. 1985), we conclude that the ADEA, as amended, was enacted pursuant to Congress' powers under section five of the Fourteenth Amendment. The majority of courts which have answered the question have likewise found that the ADEA and its amendment (extending its reach to encompass employees of state and local governments) were enacted pursuant to the Fourteenth Amendment. We agree with the majority of the courts and are persuaded by their reasoning. See, e.g., Heiar v. Crawford County, Wis., 746 F.2d 1190, 1194 (7th Cir. 1984); Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 700 (1st Cir. 1983). Arritt v. Grisell, 567 F.2d 1267, 1271 (4th Cir. 1977); EEOC v. Bd. of Governors of State Colleges and Universities, 706 F. Supp. 1377, 1381 (N.D. Ill. 1989); but, cf., Black v. Goodman, 736 F. Supp. 1042, 1045 (D.Mont. 1990).

We also conclude that Congress has made it clear that the states are to be liable for violating the ADEA. The ADEA defines "employer" (the class of potential defendants in age discrimination cases) to include "a State or political subdivision of a State or a political subdivision of a state." 29 U.S.C. § 630(b). An "employer" who violates the ADEA is liable for legal and equitable relief. 29 U.S.C. § 626(b) and (c). Unless Congress had said in so many words that it intended to abrogate the states' Eleventh Amendment immunity in age discrimination cases -- and that degree of explicitness is not required, see, Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) -- it could not have made its intention to override the Eleventh Amendment clearer. See,

Davidson v. Bd. of Governors of State Colleges & Universities, 920 F.2d 441, 443 (7th Cir. 1990).

We hold that the ADEA's express authorization for the maintenance of suits against state employers comprises adequate evidence to demonstrate congressional intent that the states' Eleventh Amendment immunity be abrogated in age discrimination suits. The KDHE's motion for summary judgment on plaintiff's ADEA claims, on this ground, is thus denied.

C. The May 2, 1988, Demotion, the June 24, 1989 Termination and Plaintiff's Claims for Retaliation

As noted above, plaintiff's claims of sex and age discrimination involve two specific incidents, the May 2, 1988, demotion and the June 17, 1989, termination. Plaintiff also claims that she was unlawfully retaliated against for engaging in protected activity in violation of Title VII and the ADEA. Defendants contend that they are entitled to summary judgment on plaintiff's claims involving the specific incidents and plaintiff's retaliation claims.

1. The May 2, 1988, Demotion

Plaintiff claims that she was demoted from the position of Director of the Division of Health because of her sex and age in violation of Title VII and the ADEA. Defendants contend that they are entitled to summary judgment with regard to plaintiff's demotion claims on two grounds. Defendants first contend that the plaintiff's claims regarding her demotion is barred by the 300 day statute of limitations found at 42 U.S.C. § 2000e-5(e) (Title VII) and 29 U.S.C. § 626(d) (ADEA). Defendants also contend that plaintiff cannot satisfy her burdens of production under the

framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). We reject defendants contentions.

a. Timeliness of the Charge

In this case it is not disputed that plaintiff filed a charge of discrimination with the EEOC 367 days after her demotion. This is outside the periods of limitations of both Title VII and the ADEA. 42 U.S.C. § 2000e-5(e); 29 U.S.C. § 626(d). However, the time limits for filing charges with the EEOC are subject to equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976). Appropriate grounds for equitable tolling include those instances where a party is "actively misled" and "lulled into inaction" by the conduct of his or her employer. See, Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984). From a review of the record in this case, we conclude that a question of facts exists concerning whether defendant Grant actively misled plaintiff and lulled plaintiff into inaction during the May 2, 1988, meeting. At trial, plaintiff must prove by a preponderance of the evidence that defendant grant "actively misled" her and lulled her into inaction by his conduct at the May 2, 1988, meeting or her claims regarding her demotion will be dismissed.

b. Plaintiff's Burdens of Production

Defendants also contend that plaintiff cannot satisfy her burdens of production as required by the McDonnell Douglas
framework to prove a case of intentional discrimination under either her Title VII claim or ADEA claim regarding the May 2, 1988, demotion. This contention is also rejected.

The allocation, burden and order of proof in Title VII and ADEA cases are nearly identical. In both instances plaintiff must initially establish a prima facie case of discrimination. To establish a prima facie case of discrimination under Title VII, plaintiff must show: (1) that she is a member of a protected class; (2) that she was doing satisfactory work; (3) that she was either demoted or discharged; and (4) that her position was filled by someone outside the protected group. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). To establish a prima facie case of discrimination under the ADEA, plaintiff must show: (1) that she is a member of the protected class; (2) that she was doing satisfactory work; (3) that she was demoted or discharged despite the adequacy of her work; and (4) that the position was filled by a younger employee. Merrick v. Northern Natural Gas Co., 911 F.2d 426, 429 (10th Cir. 1990); EEOC v. Sperry Corp., 852 F.2d 503, 507 (10th Cir. 1988).

If plaintiff establishes a prima facie case, the burden shifts to defendants to articulate a legitimate nondiscriminatory reason for the employment decision. Burdine, 450 U.S. at 254; Merrick, 911 F.2d at 431. If defendants articulate a nondiscriminatory reason for the employment decision, plaintiff has the opportunity to show that the stated reason is merely a pretext for prohibited discrimination. Burdine, 450 U.S. at 254; Merrick, 911 F.2d at 431. Despite the shifting burdens of production in the framework, the ultimate burden of persuasion of proving intentional discrimination resides at all times with plaintiff. Burdine, 450 U.S. at 254.

We conclude from the record, applying the above-outlined framework, that for the purposes of the motions

under consideration plaintiff has established a prima facie case of discrimination under both Title VII and the ADEA. The record also discloses that defendants have articulated a legitimate nondiscriminatory reason for the demotion. We conclude that a question of fact concerning whether or not defendants' articulated reason is pretext exists for the triers of fact in this case. Accordingly, defendants' motion for summary judgment on plaintiff's May 2, 1988, demotion claims under Title VII and the ADEA is denied.

2. The June 17, 1989, Termination

In this case plaintiff also claims that her liaison position with the KDHE was eliminated and that she was thus terminated on account of her sex and age in violation of Title VII and the ADEA. Defendants contend that, under the McDonnell Douglas framework, plaintiff cannot satisfy her burdens of production with respect to these claims. We conclude that for the purposes of the motions at hand that plaintiff has established a prima facie case of sex and age discrimination with respect to the June 17, 1989, termination. We also conclude that defendant has stated a legitimate nondiscriminatory reason for the elimination of plaintiff's position. Finally, we conclude that a question of fact exists for the triers of fact in this case concerning whether defendant's articulated reason for its decision to eliminate plaintiff's position was merely pretext for discrimination. Defendants' motion for summary judgment concerning plaintiff's June 17, 1989, termination claims under Title VII and the ADEA is therefore denied.

3. Retaliation

Plaintiff also claims that defendants eliminated her position and refused to offer her another job, thus terminating her employment, in retaliation for having engaged an attorney in connection with her demotion. Defendants contend that plaintiff cannot establish a prima facie case of retaliation because plaintiff cannot establish a causal nexus between her protected activity and the elimination of her position. We reject defendants' contention.

To establish a prima facie case of retaliation, plaintiff must show: (1) that she engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) that she was disadvantaged by an action of her employer subsequent to or contemporaneously with such opposition or participation; and (3) that there is a causal connection between the protected activity and the adverse employment action. Burrus v. United Tel. Co., 683 F.2d 339, 343 (10th Cir. 1982). An identical test is used in cases of retaliatory discharge under the ADEA. See Hollander v. American Cyanamid Co., 895 F.2d 80, 85 (2d Cir. 1990). The allocation, burden and order of proof after establishment of the prima facie case is the same as outlined in Burdine, 450 U.S. at 254 and Merrick, 911 F.2d at 431, as noted above.

We conclude that plaintiff can establish a prima facie case of retaliation. In May, 1988, plaintiff and her attorney confronted defendant Grant regarding her demotion. At the meeting, plaintiff's attorney raised the issue of prohibited sex or age discrimination and plaintiff spoke out against what she perceived to be discrimination. In June, 1989, plaintiff's newly created position was eliminated. From the record we cannot conclude as a matter of law that the action of the

KDHE is so remote from plaintiff's expressed opposition to discrimination as to negate a causal connection between the two actions. A factual issue remains for trial as to the causal connection between the two actions. A question of fact would also exist as to whether defendants' stated reason for the adverse employment decision is mere pretext for prohibited discrimination. On these grounds, defendants' motion for summary judgment on plaintiff's retaliation claims is denied.

IV. CONCLUSION

Plaintiff's section 1983, KAAD, and ADEA claims against defendant Grant are dismissed. Questions of fact preclude dismissal of the remainder of plaintiff's claims, which are: plaintiff's ADEA claims against the KDHE for age discrimination and retaliation; and plaintiff's Title VII claims against the KDHE and defendant Grant, in his official capacity, for sex discrimination and retaliation.

IT IS, THEREFORE, BY THE COURT ORDERED that defendants' motions for summary judgment (Docs. 92 and 63) are granted in part and denied in part. Plaintiff's claims under section 1983, the KAAD, and the ADEA against defendant Grant are dismissed. Plaintiff's ADEA claims against the KDHE and plaintiff's Title VII claims against both defendants remain to be tried.

Copies of this memorandum and order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 4 day of June, 1991.

/s/ G.T. VAN BEBBER
G. T. VAN BEBBER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DR. PATRICIA SCHLOESSER,	)	
	)	
Plaintiff,	)	
	)	CIVIL
vs.	)	ACTION
	)	No. 90-2029-V
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and STANLEY C. GRANT,	)	
	)	
Defendants.	)	

VERDICT

We, the jury, duly empaneled and sworn upon our oaths, present the following answers to the questions submitted by the court:

(1) Do you find that defendant actively mislead plaintiff by misrepresentation or concealment and thereby caused or induced plaintiff to refrain from filing an administrative charge within 300 days of her demotion?

YES__X__ NO____

NOTE: If you answered "YES" to question (1), proceed to answer question (2). If you answered "NO" to question (1), disregard question (2), and proceed to question (3).

(2) Do you find that defendant violated the Age Discrimination in Employment Act, in that plaintiff's age was a determining factor in defendant's decision to demote her?

YES__X__ NO____

(3) Do you find that defendant violated the Age Discrimination in Employment Act, in that plaintiff's age was a determining factor in defendant's decision to eliminate her position?

YES____ NO_X__

(4) If you answered "YES" to question (2), do you find that defendant willfully violated the Age Discrimination in Employment Act, in that plaintiff's age was the predominant factor in defendant's decision to demote her?

YES____ NO_X__

(5) If you answered "YES" to question (3), do you find that defendant willfully violated the Age Discrimination in Employment Act, in that plaintiff's age was the predominant factor in defendant's decision to eliminate her position?

YES____ NO____

(6) Do you find that defendant retaliated against plaintiff because she engaged in an activity

protected by the Age Discrimination in Employment Act?

YES____ NO_X__

(7) If you answered "YES" to question (6), do you find that in retaliating against plaintiff defendant willfully violated the Age Discrimination in Employment Act, in that plaintiff's engagement in protected activity was the predominant factor in defendant's decision to eliminate her position?

YES____ NO____

(8) If you answered "YES" to either question (2), (3), or (6), or any combination thereof, what amount of "back pay" do you find should be awarded plaintiff as damages:

(a) on her demotion claim? $__89,939.__

(b) on her elimination claim? $__- 0 -__

(9) If you answered "YES" to either question (2), (3), or (6), or any combination thereof, do you find that if plaintiff was reinstated to her previous position that a productive and amicable working relationship between plaintiff and defendant would be possible?

YES__X__ NO____

(10) If you answered "NO" to question (9), what amount of "front pay" do you find should be awarded plaintiff as damages?

$_____

July 3, 1991
DATE

/s/John Burris
FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DR. PATRICIA SCHLOESSER,	)	
	)	
Plaintiff,	)	
	)	CIVIL
vs.	)	ACTION
	)	No. 90-2029-V
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and STANLEY C. GRANT,	)	
	)	
Defendants.	)	

JOURNAL ENTRY

NOW on this 25th day of June, 1991, this cause came on for trial before a jury. Plaintiff appeared in person and through her attorneys, Darrell L. Havener, Thomas E. Ruzicka and J. Mark Baird. Defendant The Kansas Department of Health and Environment ("KDHE") appeared by designated representative, Sally O'Grady, and by its attorneys, Carl A. Gallagher and Nancy L. Ulrich.

On the 2nd day of July, 1991, this cause was submitted to the jury upon the evidence heard, instructions given and arguments of counsel. On the 3rd day of July, 1991, the jury, after due deliberation, returned into open court its verdict, which is as follows:

That defendant KDHE violated the Age Discrimination In Employment Act by demoting plaintiff from her position as Director of the Division of Health in May of 1988;

That defendant KDHE did not willfully violate the Age Discrimination In Employment Act;

That defendant KDHE did not violate the Age Discrimination In Employment Act by eliminating plaintiff's position as Deputy Director of Federal and State Relations in May of 1989;

That defendant KDHE did not violate the Age Discrimination In Employment Act by retaliating against plaintiff for engaging in protected activity.

The jury found that plaintiff should be awarded $89,939.00 in back pay on her demotion claim.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be, and is hereby, entered on the verdict in favor of plaintiff on her demotion claim. Pursuant to the jury's verdict, plaintiff is hereby awarded $89,939.00 in back pay. Furthermore, all counsel agree that both parties prefer the remedy of front pay to that of reinstatement. The parties further stipulate that the evidence would show $120,000.00 would be the appropriate amount of front pay. It is, therefore, ordered plaintiff is awarded $120,000.00 in front pay, for a total recovery of $209,939.00.

Counsel for plaintiff is instructed to submit an application for attorneys' fees within fourteen (14) days of the entry of this Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment be, and is hereby, entered in favor of defendant on plaintiff's retaliation and job elimination claims and upon the issue of willfulness.

Costs are hereby assessed against defendant KDHE.

Dated this 27th day of September, 1991.

/s/ G.T. Van Bebber
The Honorable G. Thomas Van Bebber

APPROVED AS TO FORM
AND CONTENT:

WATSON, ESS, MARSHALL & ENGGAS

/s/ Thomas E. Ruzicka
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OFFICE OF THE ATTORNEY GENERAL
ROBERT T. STEPHAN

/s/ Nancy L. Ulrich
Nancy L. Ulrich, #11778
Assistant Attorney General

/s/ Carl A. Gallagher
Carl A. Gallagher, #10736
Assistant Attorney General
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Topeka, KS 66612
(913) 296-2215
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DR. PATRICIA SCHLOESSER,	)	
	)	
Plaintiff,	)	
	)	CIVIL
vs.	)	ACTION
	)	No. 90-2029-V
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and STANLEY C. GRANT,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case is before the court on the motions (Doc. 165) of defendants Kansas Department of Health and Environment and Stanley C. Grant for judgment notwithstanding the verdict or to amend the judgment. Fed.R.Civ.P. 50(b) and 59(e). Plaintiff Dr. Patricia Schloesser has responded (Doc. 168) and opposed defendants' motions. The motions are denied.

In this employment discrimination case, plaintiff claimed that she was demoted, discharged, and retaliated against by defendants because of her age and sex in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 631 et seq., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. From June 25 to July 3, 1991, plaintiff's ADEA claims were tried to a jury. The jury returned a verdict in favor of plaintiff on her demotion claim and found that she was entitled to recover back pay in the amount of $89,939.00. The jury also found that she should be reinstated to her former position. As to

the remainder of plaintiff's ADEA claims, the jury found for defendants. In the journal entry of judgment (Doc. 163), the parties, and the court, agreed that plaintiff should receive front pay in the amount of $120,000.00 in lieu of reinstatement. The parties' agreement also disposed of plaintiff's Title VII claims. On September 27, 1991, judgment was entered in favor of plaintiff in the amount of $209,939.00.

Defendants have filed two post-trial motions. First, defendants move the court for judgment notwithstanding the verdict on the grounds that: (1) plaintiff failed to prove that defendants' legitimate, non-discriminatory reasons for her demotion were pretextual; and (2) plaintiff's demotion claim was time-barred. In the alternative, defendants move the court to amend the judgment, arguing that plaintiff is not entitled to an award of front pay in this case. The court will address defendants' contentions, separately.

The Motion for Judgment Notwithstanding the Verdict

The standard for granting a motion for judgment n.o.v. is precisely the same as that for directing a verdict. Hurd v. American Hoist & Derrick Co., 734 F.2d 495, 499 (10th Cir. 1984). The court must view the evidence in the light most favorable to the party against whom the motion is made. Downie v. Abex Corp., 741 F.2d 1235 (10th Cir. 1984). It is not the court's duty to weigh the evidence presented, or to pass upon the credibility of witnesses, or the substitute its judgment of the facts for that of the jury. Lucas v. Dover Corp., Norris Div., 857 F.2d 1397, 1400 (10th Cir. 1988). A judgment n.o.v. is cautiously and sparingly granted when the court is certain the evidence "conclusively favors one party such that reasonable men would not arrive at a contrary verdict." Western Plains Service Corp. v. Ponderosa Development Corp., 769 F.2d 654, 656 (10th Cir.

1985). A motion for judgment n.o.v. may not be granted unless the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made. E.E.O.C. v. Univ. of Oklahoma, 774 F.2d 999, 1001 (10th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

Having reviewed the evidence, and applying the foregoing principles, the court concludes that defendants are not entitled to judgment notwithstanding the verdict. The court finds that the jury was justified in finding that plaintiff had been demoted because of her age. The court also finds that the jury was justified in finding that defendant had been lulled into inaction by certain representations made to her by defendant Grant. As a result, her demotion claim was not time-barred. Defendants' motion for judgment notwithstanding the verdict is denied.

The Motion to Amend the Judgment

Defendants also move the court to amend the judgment entered in this case, contending that plaintiff is not entitled to receive front pay. The court notes that the parties agreed that the remedy of front pay, in lieu of reinstatment, was the appropriate remedy. See Doc. 163. The court agreed with the parties that front pay was the more appropriate remedy because it would be impossible to reinstate plaintiff to her previous position and because the period of front pay would extend only two years. Bingman v. Natkin & Co., 937 F.2d 553, 558 (10th Cir. 1991). The defendants, having agreed to an award of front pay, are now foreclosed from arguing that plaintiff is not entitled to front pay. The motion to amend the judgment is denied.

IT IS THEREFORE, BY THE COURT ORDERED that defendants' motions for judgment notwithstanding the verdict or to amend the judgment (Doc 165) are denied.

Copies of this memorandum and order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 27 day of November, 1991.

/s/ G.T. Van Bebber
G.T. VAN BEBBER
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DR. PATRICIA SCHLOESSER,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	92-3079
	)	(D.C. No.
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and STANLEY C. GRANT,	)	90-2029-V)
	)	(D. Kan.)
	)	
	)	
Defendants-Appellants.	)	

ORDER AND JUDGMENT*

Before LOGAN and KELLY, Circuit Judges, and ALLEY, District Judge.†

Defendants appeal the denial of summary judgment. Our jurisdiction arises under 28 U.S.C. § 1291 and we reverse.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

† The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

Background

Plaintiff-appellee Dr. Schloesser brought this action after a demotion and ultimately the termination of her employment with Defendant-appellant Kansas Department of Health and Environment (KDHE). Dr. Schloesser claims that these actions were the result of discrimination based on age, violating the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621.634. Defendants moved for summary judgment, arguing that Eleventh Amendment immunity applied and that the claim regarding the demotion was time-barred. The district court denied summary judgment and, at trial, Plaintiff prevailed only on the claim relating to her demotion.

Discussion

We review the denial of summary judgment de novo, utilizing the same legal standard as the district court in evaluating the summary judgment motion. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986).

At a minimum, a movant must point to those portions of the record that demonstrate an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317,

322-23 (1986). If a movant establishes entitlement to judgment as a matter of law given uncontroverted, operative facts contained in the documentary evidence, summary judgment will lie. See Anderson, 477 U.S. at 251.

Many of the facts of this case were not in dispute. The Secretary of the KDHE, Dr. Grant, appointed Dr. Schloesser, a sixty-three year old woman, as Director of Health. Obviously, the motivation behind the activity that followed is in dispute, but it is undisputed that in a meeting on May 2, 1988, Dr. Grant informed Dr. Schloesser that she would no longer serve as Director of Health. A new position, with a lower salary and a lower classification, was created for her. Also at that meeting, Plaintiff alleged, Dr. Grant made several comments to the effect that Dr. Schloesser would be replaced with a "kid." Plaintiff served in her new capacity until May 1989, when that position was eliminated. She filed a complaint with the EEOC on June 19, 1989.

Timely filing of a discrimination charge is a prerequisite to an ADEA claim. 29 U.S.C. § 626(d). An individual has 300 days from the alleged discriminatory act in which to file a charge with the EEOC. 29 U.S.C. § 626(d)(2). Dr. Schloesser argues that the limitations period should be tolled because Defendants actively misled her at the May 2, 1988 meeting and lulled her into inaction. The district court agreed that the limitations period might be

subsequent to equitable tolling and refused to grant Defendants' motion for summary judgment.[1]

We have recognized that a defendant may be equitably estopped from asserting a defense based on a limitations period if that defendant has "'actively misled,'" Martinez v. Orr, 738 F.2d 1107, 1110 (10th Cir. 1984) (quoting Wilkerson v. Siegfried Ins. Agency, Inc., 683 F.2d 344, 348 (10th Cir. 1982)), or if a plaintiff "has been 'lulled into inaction by her past employer, state or federal agencies, or the courts,'" Martinez, 738 F.2d at 1110 (quoting Carlile v. South Routt Sch. Dist. RE 3-J, 652 F.2d 981, 986 (10th Cir. 1981)).

Dr. Schloesser's ADEA claim, on the other hand, involved two separate acts by Defendants -- her demotion and the subsequent elimination of her new job. Plaintiff only prevailed on, and Defendants only appeal from, the demotion claim. We are convinced that Plaintiff had ample notice that possible discrimination based on age had resulted in her demotion after the May, 1988 meeting. She immediately suffered the consequences of lower pay, a less desirable office space, less administrative authority and diminished support staff assistance. Prior to the meeting, comments about Dr. Schloesser's retirement had been directed towards

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[1] As a technical matter, we agree with the court in Cada v. Baxter Healthcare Corp. 920 F.2d 446, 450 (7th Cir. 1990), cert. denied, 111 S. Ct. 2916 (1991), that equitable tolling should be distinguished from equitable estoppel. Equitable estoppel is applied if a defendant takes active steps to prevent a plaintiff from suing in time, most usually by promising not to plead the statute of limitations. Equitable tolling of the limitations period is appropriate if a plaintiff is unable to obtain important information surrounding the claim despite due diligence. Plaintiff urges the former, although both Plaintiff and the district court used the label of the latter.

her and at the meeting Dr. Grant referred to Dr. Schloesser's replacement as a "kid." At that point, "facts that would support a cause of action [were] or [should have been] apparent." Blumberg v. HCA Management Co., 848 F.2d 642, 645 (5th Cir. 1988), cert. denied, 488 U.S. 1007 (1989). Plaintiff points to no action taken by the Defendants to mislead her as to any of the pertinent facts or "trick" her into allowing the limitation period to pass. See Irwin v. Veterans Admin., 111 S. Ct. 453, 457 (1990).

Dr. Schloesser's Memorandum in Opposition to Summary Judgment discusses various disputed facts which go to the merits of her discrimination claim. However, the limitation issue does not turn on the truthfulness of Defendants' proffered legitimate reasons for the demotion and, in fact, forecloses the relevance of the merits of Plaintiff's claim. See Fleury v. Harper & Row Publishers, Inc., 698 F.2d 1022, 1029 (9th Cir.), cert. denied, 464 U.S. 846 (1983). Rather, to determine when the limitation period began to run, we focus on what information was available to the Plaintiff and when it was available. The material facts to that inquiry were not in dispute and summary judgment should have been granted in favor of the Defendants with respect to the demotion claim.

Dr. Schloesser cites several cases where courts have found equitable estoppel of the limitations period appropriate based upon an employer's promise or reinstatement. See Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981); Bonham v. Dresser Indust., 569 F.2d 187 (3d Cir. 1977), cert. denied, 439 U.S. 821 (1978). Plaintiff overlooks a major factual difference from her own situation which renders these cases inapplicable. The "reinstatement" cases allow equitable relief to the plaintiff who files late because "subsequent to his discharge, demotion or force

retirement, his employer had promised to reinstate him in his former position or in a comparable alternative position." Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45, 49 (2d Cir. 1985). Here, Plaintiff has not alleged that, after her demotion, Defendants made promises that she would be reinstated in a comparable position. There was no intention that the Defendants or Dr. Schloesser ever attempted "settlement negotiations" to address the alleged improper demotion. Id. at 50.

Finally, Plaintiff argues that, because Defendants failed to object to the jury instruction concerning tolling of the limitation period at trial, it is now the law of the case. Plaintiff misinterprets the nature of the Defendants' argument on appeal. Defendants do not argue that there is no such thing as equitable tolling or even that the instruction is an inaccurate statement of law. Rather, their contention, and the principle upon which our decision rests, is that when the Defendants moved for summary judgment, the court failed to find that as a matter of law, given the undisputed facts, equity would not toll the limitations period.

REVERSED.

Entered for the Court

/s/ Paul J. Kelly, Jr.
Paul J. Kelly, Jr.
Circuit Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DR. PATRICIA SCHLOESSER,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	92-3079
	)	
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and STANLEY C. GRANT,	)	
	)	
Defendants-Appellants.	)	

ORDER
Entered May 17, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges, and ALLEY, District Judge.*

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*The Honorable Wayne E. Alley, United States District Judge for the Western District of Oklahoma, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

The following selections are excerpts of Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DR. PATRICIA SCHLOESSER,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
vs.	)	90-2029-V
	)	
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT	)	
	)	
and	)	
	)	
STANLEY C. GRANT,	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. MATERIAL FACTS

1. Plaintiff Patricia Schloesser was employed by The Kansas Department of Health and Environment ("KDHE") for the periods of August, 1952 to June, 1971 and January, 1974 to June 14, 1989. (Schloesser Depo., pp. 52, 59, 103.) In August, 1952, she commenced employment as a pediatric consultant. (Schloesser Depo., p. 57.) In July, 1958, she became the Director of the Bureau of Maternal and Child Health ("MCH"). (Schloesser Depo., p. 68.) In

January, 1974, she was re-employed as Assistant Director of the MCH. (Schloesser Depo., pp. 105-106.) In 1975, Dr. Schloesser was promoted to Director of the Bureau. (Schloesser Depo., p. 110.) In 1985, Dr. Schloesser was appointed as a medical consultant in MCH.

5. On or about June 18, 1987, Dr. Stanley Grant, a geologist, became Secretary of the KDHE. (Grant Depo., p. 33.) In August, 1987, Dr. Grant appointed Dr. Schloesser as Director of the Division of Health. (Schloesser Depo., p. 186.) . . . .

21. On May 2, 1988, Dr. Schloesser and her attorney, Brian Finucane, met with Dr. Grant regarding the forced reassignment. (Schloesser Depo., p. 399.) . . . .

23. Mr. Finucane, Dr. Grant and Dr. Schloesser proceeded to discuss Dr. Schloesser's new position, Deputy Director for Federal and State Relations. (Finucane Depo., pp. 50-53.) Dr. Grant expressed his intention to develop the new position into an important one for KDHE. (Finucane Depo., p. 56.) Dr. Grant assured Dr. Schloesser that she would receive the necessary clerical and support staff to perform her job. (Finucane Depo., p. 54.)

25. Dr. Grant had prepared two performance evaluations for Dr. Schloesser -- one of which was presented at the May 2 meeting. (Grant Depo. 256.) The two evaluations were identical, except for the bottom-line evaluation. (Grant Depo., pp. 256-258.) One evaluation form reflected "satisfactory" performance, and the other form reflected "unsatisfactory" performance. (Grant Depo., pp. 256-258.)

26. Dr. Grant now contends that he transferred Dr. Schloesser to the Deputy Director position on a temporary or conditional basis. (Grant Depo., 269.) He testified that he told Dr. Schloesser that he would evaluate the need for the

position after one year. (Grant Depo., p. 269.) Dr. Grant characterized the position as a "trial balloon." (Grant Depo., p. 269.) Dr. Schloesser denies that Dr. Grant made any such representation. (Schloesser Affidavit, ¶ 6.)

30. In accordance with the discussions with Dr. Grant at the May 2 meeting, Dr. Schloesser submitted a position description to Dr. Grant for the newly created position. (Schloesser Depo., p. 406.) The position description was never approved and signed, in accordance with KDHE policy. (Schloesser Depo., p. 407.) Dr. Grant, and later Dr. Konigsberg, refused to discuss with her the position description or her new duties and responsibilities. (Schloesser Depo., p. 407.)

33. Dr. Schloesser's name was also excluded from departmental organizational charts published in October, 1988 and in February and May of 1989. (See Exhibits 5, 6 and 7.) By memorandum to Dr. Hulett dated July 6, 1988, Dr. Schloesser requested that her name be included on the organizational charts. (Exhibit 8.) Dr. Grant was advised of Dr. Schloesser's concerns. (Grant Depo., p. 296.) Dr. Grant did not later include Dr. Schloesser's name on the chart -- even though he concedes that it was important for people in the KDHE to know the position existed. (Grant Depo., p. 298.) Dr. Schloesser later raised the issue with Dr. Konigsberg. (Konigsberg Depo., p. 106.) Dr. Konigsberg also failed to take any remedial action, allegedly reasoning that "staff level" positions need not appear on the charts. (Konigsberg Depo., pp. 108-109.) However, the only Deputy Director other than Dr. Schloesser, Dick Morrissey, a younger male, appeared on the organizational chart. (Konigsberg Depo., p. 109.)

35. Dr. Schloesser was also deprived of secretarial and clerical assistance. (Schloesser Depo., pp. 419-420.)

Dr. Konigsberg only admitted that he told Pam Carpenter, Dr. Schloesser's former secretary, that his work came first and instructed her to "set some priorities." (Konigsberg Depo., p. 151.) However, Ms. Carpenter testified that Dr. Konigsberg told her to stop serving as a secretary for Dr. Schloesser. (Carpenter Depo., p. 37.)

36. Dr. Schloesser's office was moved while she was away on an out-of-state trip. (Schloesser Depo, p. 431.) Her new office was located in an isolated room on a separate floor from the Division of Health's central office. (Schloesser Depo., p. 418.) This required her to walk long distances to pick up and deliver her mail and messages. (Schloesser Depo., pp. 419-420; Carpenter Depo., p. 39.)

42. Dr. Schloesser was compelled to submit a forced retirement, effective June 17, 1989.

The following selections are excerpts of Defendants' Memorandum in Support of Motion for Summary Judgment:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DR. PATRICIA SCHLOESSER,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
vs.	)	90-2029-V
	)	
THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and STANLEY C. GRANT,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

22. On May 2, 1988, plaintiff brought her attorney, Brian Finucane, to the follow-up meeting with Dr. Grant. Mr. Finucane warned Secretary Grant that he could not "fire someone" for an unlawful reason such as age or sex discrimination. Secretary Grant denied he was demoting plaintiff for any such reason. At the end of the meeting, Mr.

Finucane understood that plaintiff was demoted. Depo. of Brian Finucane, pp. 31, 42, 77.

32. Plaintiff filed her EEOC/KCCR complaint with the KCCR on June 21, 1989. KCCR "Charge of Discrimination."

29 U.S.C. §626(d) states:

> **(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion**
>
> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed---
>
> **(1)** within 180 days after the alleged unlawful practice occurred; or
>
> **(2)** in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.
>
> Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

TRIAL TRANSCRIPT

Following are excerpts from the trial testimony of Brian Finucane, Dr. Patricia Schloesser's attorney at the May 2, 1988 meeting:

Q. Can you tell me approximately when that meeting occurred?

A. I believe it was on May 2nd, 1988. (Trial Transcript, pg. 131).

. . . .

Q. Okay. Mr. Finucane, I would like you to tell the ladies and gentlemen of the jury what happened at the meeting on May 2nd, 1988 involving Dr. Schloesser, the Secretary and yourself.

A. Okay. We arrived at the office of Dr. Grant that morning. It was approximately nine o'clock in the morning. We briefly stopped at his receptionist or his secretary's office and we went into a room where there was a conference room and the three of us sat down at the conference table. The very first thing that Dr. Grant said as we sat down, once we got past the pleasantries, was that Dr. Schloesser was an unclassified employee and because she was, he could fire her. He had the right to fire her at any time. And I was a little bit startled by that remark and I hesitated for a minute and I said, uh, I understand the difference between classified and unclassified employee, but you still could not discharge Dr. Schloesser for an unlawful reason.

And I stopped and he came back and he said, no, I have the right to fire her at any time. And I again stopped for a moment and then I said, well, that would not be the case if there was claims such as sex discrimination, age discrimination, I also referred to restriction of First

Amendment rights, the freedom of expression and retaliation. And at that point Dr. Grant became a little bit agitated and he said, this doesn't involve that. And I at that point concluded that we ought to get out of this type of discussion and I said that I didn't think it would be productive for us to discuss the law or claims that Dr. Schloesser might have because it was our intention to meet and discuss things in a productive and a positive fashion so that Dr. Schloesser would not be -- would not be making claims arising out of the situation. And at that point Dr. Grant, he kind of settled back and the discussion moved to a discussion of the new job . . . (Trial Transcript, pgs. 131-132).

. . . .

Q. Did the Secretary tell you what his intentions were for the new position that Dr. Schloesser was going to assume?

A. Yes. He described it as an important position. He said that he wanted her to continue to do the kinds of things she had been doing in the past in terms of -- I think she was very active in serving and working with various federal and state and local and regional organizations and committees. Dr. Grant said that was precisely the kind of work that he wanted her to continue doing in her new position. He said he considered it an important position. He said at one point there was consideration that she would report directly to the Secretary himself, but that it turned out she would report to the new director. (Trial Transcript, pg. 134).

Following are excerpts from the trial testimony of Petitioner, Dr. Patricia Schloesser:

Q. When did you start work at the Kansas State Board of Health, can you remember?

A. August.

Q. Of what year?

A. Of 1952. (Trial Transcript., pg. 73).

. . . .

Q. (By Mr. Baird) Dr. Schloesser, I'd now like to hand you what has been marked as Plaintiff's Exhibit Number 77. Would you please identify that document for the ladies and gentlemen of the jury?

A. This is a memorandum to Dr. K from Dr. S, but that really is the new -- my new boss, Dr. Konigsberg, Schloesser. And it's a memo asking for some clarification about my working title professionally, particularly whether I would go and give and speech or participate in medical things. I outlined some ideas. (Trial Transcript, pg. 173).

. . .

Q. Was there also an issue involving the organizational charts?

A. One that I expressed concern about very early.

Q. And what was that problem?

A. Well, in July or June of '88, shortly after I'd assumed my new responsibility, Secretary Grant issued a organizational chart who the key players were in the State Department of Health and Environment.

Q. I've handed you what's been marked Plaintiff's Exhibit Number 128. Would you please identify that document?

A. That's correct. A memo to the management group from Stanley C. Grant about department organizational chart of July of '88.

MR. BAIRD: I'd like to move for the introduction of Number 128, Your Honor.

THE COURT: Is there any objection?

MS. ULRICH: I don't believe so, Your Honor.

MR. BAIRD: We would also like to display the memo on the overhead projector, Your Honor.

MS. ULRICH: Do you have an extra copy, Mark?

MR. BAIRD: Sure

MS. ULRICH: No objection.

THE COURT: Isn't this a document that's already been admitted?

MR. BAIRD: The organizational chart which is attached has already been introduced into evidence but the memo which accompanied the organizational chart has not, Your Honor.

Q. (By Mr. Baird) Did you have any concerns about the 22nd, 1988 memo after you received it, Dr. Schloesser?

A. Well, I did because it talks about wide distribution to private organizations.

Q. Wide distribution of what?

A. Of the organizational chart. My name wasn't on it.

Q. Why did that concern you?

A. Well, if I am supposed to be the contact person with all kinds of state and federal agencies and a chart goes out and I'm not even on it, you know, what kind of role do I have?

Q. Did you bring it to anybody's attention?

A. I did.

Q. Who did you talk to about it?

A. I think I wrote a memo and talked to Acting Director Dr. Hulett. (Trial Transcript, pgs. 177-179).

. . . .

Q. Was your office moved while you were serving as Health Officer II Deputy Director for State and Federal Relations?

A. I was -- my office was moved in late September.

Q. Would you describe the location of your office for the jury?

A. Well, it was a big office, but it had been used for a break room. It really wasn't quite suitable for a regular office. And the door bore directly on a main thoroughfare with a great deal of noise so you had to keep the door shut or you couldn't do any work. But it didn't have proper ventilation or heating and it was always so hot I had to keep the windows open, which made me feel pretty sick because I was already sick with cancer. (Trial Transcript, pg. 188).

. . . .

Q. (By Mr. Baird) You're also claiming in this lawsuit that your employment was terminated because you opposed unlawful age discrimination?

A. That's correct.

Q. What led you to that conclusion?

A. Well, the issue came up during the meeting of '88 and Secretary Grant denied any reason of my demotion even though I don't think it was true, but he said it had nothing to do with this. And made me big promises about how this was going to be developed into a very significant and important job for the Department of Health and Environment. And I'd get recognition, I'd get resources, I'd have secretarial help, I'd get support basically from the Department. And frankly, that didn't happen. It just -- you know, not being on the organization charts, I was never asked to go to Washington by Secretary Grant. When I went, I went on other reasons and doubled up. He never gave me

an assignment. It was just like I was buried upstairs. People were uncomfortable about seeking advice. And all year long, you know, like the comment, you ought to retire while your reputation is intact, it just seemed like everything was being orchestrated to make me appear invisible, to go against me. (Trial Transcript, pgs. 207-208).

. . . .

Q. When were you first notified by the Secretary that he intended to demote you from your position as director of the Division of Health?

A. That was just two or three weeks after my 64th birthday. It was April 29th, I believe, on a Friday. (Trial Transcript, pg. 160).

. . . .

Q. Did the Secretary tell you why he was demoting you from your position as director?

A. Well, he actually first said, you know, are you planning to retire? And I said, no. And he next said, well, then I have an alternate position that I can offer you. And -- because I'm not happy with you as director. Any if you won't take it, then I'll bring out a bad evaluation and I'll fire you. And I was shocked. I couldn't believe it. (Trial Transcript, pg. 161).

. . . .

Q. Now in the meeting did Mr. Finucane say anything about discrimination?

A. He brought up some federal laws that I couldn't believe, discharged for illegal discrimination on sex and age. And Dr. Grant responded that that wasn't the reason and got rather angry about it.

Q. Did you proceed to discuss your new position as Health Officer II, deputy director for federal and state relations?

A. We did. And he presented it in a very positive light. He was complimentary of the fact that I had a lot of knowledge and contacts and knew a lot of the congressional delegation. And felt that I could further the interest of the Department through my experience and contacts being a PR person, but then in addition that I would be able to resume some of the medical consultation that I had to set aside in the past.

Q. Did he say that the need for the position would need to be reevaluated after a year passed?

A. No.

Q. Did he say anything about the criteria upon which your performance would be judged?

A. It was rather vague. I raised the question of whether my performance would be based on how much new money I brought in. And he said, no, that would not be that. (Trial Transcript, pgs. 165-166).

. . . .

Q. (By Mr. Baird) Dr. Schloesser, did you file a lawsuit against the Division of Health?

A. Definitely not.

Q. Did you file a discrimination claim with the Equal Employment Opportunity Commission?

A. Not at that time.

Q. Okay. Why didn't you do that?

A. I got very busy on the new job and it looked initially like I was going to get very positive support and I was going to do the best I could.

Q. (By Mr. Baird) and this is based upon the meeting you had with the Secretary on May 2nd?

A. Right. Right. (Trial Transcript, pg. 170).

. . . .

Following are excerpts from the trial testimony of Stanley Grant:

Q. All right, sir. And in that letter -- would you read the letter, please. And I may stop you -- let's just cover the first paragraph, please, sir.

A. All right. This is to Dr. Schloesser. "It is with pleasure that I appoint you Director, Division of Health, Kansas State Department of health and Environment, effective on the 18th day of August, 1987, with a basic starting annual salary of $67,813. This is an unclassified appointment serving at the pleasure of the Secretary, Department of Health and Environment." (Trial Transcript, pgs. 324-325).

. . . .

Q. "Breakdown of evaluation:" New paragraph. And that's a heading in all caps. And under that heading, "Strengths tend to outweigh weakness, but the overall evaluation stands at satisfactory."

And "satisfactory" is in all capital letters. Is that correct?

A. Yes.

Q. Now, Mr. Secretary, you wrote a substantially identical duplicate of that performance evaluation for Dr. Schloesser bearing the same date, didn't you?

A. Yes.

Q. And you said at the top, Performance Evaluation, Comments on Performance Expectation, her name and the date, and then all of the paragraphs that we read except the last one were identical to Exhibit 50?

A. Identical, that's correct.

Q. And in this other one that you wrote that was identical to Exhibit 50, all you did was change the last word?

A. I think so.

Q. All right. And you changed the last word so it read "unsatisfactory", didn't you?

A. Yes. (Trial Transcript, pgs. 374-375).

Following are excerpts from the trial testimony of Pam Carpenter, Petitioner's secretary:

Q. All right. Now let's see, six months later was Dr. -- or approximately six months after that, was Dr. Konigsberg hired?

A. Yes.

Q. And did you have any working relationship with Dr. Konigsberg?

A. When he became the Director of Health, I was his secretary.

Q. You were his secretary?

A. (Nods head up and down.)

Q. Did you continue to do secretarial work for Dr. Pat Schloesser?

A. For a period of time.

Q. And then what caused that to end?

A. Dr. Konigsberg became busier and busier and my workload once again became busier and there just wasn't time for me to do her work.

Q. Did Dr. Konigsberg -- how do you pronounce it?

A. Konigsberg.

Q. Did Dr. Konigsberg say anything to you whether you should or should not continue to do Dr. Schloesser's work?

A. Yes.

Q. What did he tell you?

A. He said that I should not do her work.

Q. Period?

A. Right. (Trial Transcript, pgs. 614-615).

Following are excerpts from the trial testimony of Sally S. O'Grady, KDHE Director of the Office of Personnel Services:

Q. Do you know what Dr. Schloesser's salary was at the time the position was eliminated?

A. I believe $65,000. That was an annual salary, by the way, $65,000.

Q. Do you keep salary records for all the personnel of the Department?

A. Yes.

Q. Are you aware of relative salaries for 1988?

A. Yes.

Q. Who was that?

A. Patricia Schloesser.

Q. Do you know what Dr. Grant's salary was for 1988?

A. Yes. It was approximately $65,000. (Trial Transcript, pg. 734-744).

Supreme Court, U.S.
FILED
SEP 17 1993
OFFICE OF THE CLERK

No. 93-258

In The

Supreme Court of the United States

October Term, 1993

DR. PATRICIA SCHLOESSER,

Petitioner,

v.

THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and DR. STANLEY C. GRANT

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT PROPERLY REVIEW AND REVERSE THE DISTRICT COURT.

II. DOES CONFLICTING LAW AMONG THE CIRCUITS EXIST ON THE LAW CONCERNING FEDERAL LIMITATIONS PERIOD IN DETERMINING WHETHER AN EMPLOYEE MAY ASSERT EQUITABLE MODIFICATION WHEN AN EMPLOYEE'S CLAIM IS TIME-BARRED PURSUANT TO 29 U.S.C. § 626(d).

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents .....ii, iii

Table of Authorities .....iv, v

Statement of the Case 1

Reasons Certiorari Should Be Denied 3

I. The United States Court of Appeals for the Tenth Circuit Properly Reviewed and Reversed the District Court. 3

A. Petitioner's Argument is raised for the First Time 3

B. The 10th Circuit Ruling is proper on other grounds 3

C. The Court of Appeals Used the Correct Standard of Review 5

1. The Court of Appeals did not Substitute Itself for Trier of Fact 5

2. The Court of Appeals Correctly Applied the Facts 5

D. Conclusion 6

II. No Conflicting Law Among the Circuits Exists on the Law Concerning Federal Limitations Periods in Determining Whether an Employee may Assert Equitable Modification when an Employee's Claim is Time-Barred Pursuant to 29 U.S.C. § 626(d) 6

A. The Tenth Circuit Followed Existing Precedent 7

TABLE OF CONTENTS—Continued

Page

B. The Previous Tenth Circuit Standard 9

C. Decisions in other Circuits 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page

Baldwin County Welcome Center v. Brown,
466 U.S. 147, 152, 80 L.Ed.2d 196, 202,
104 S.Ct. 1723 (1984) 7, 9

Blumberg v. HCA Management Co., Inc.,
848 F.2d 642 (5th Cir. 1988) 11

Cada v. Baxter Healthcare Corp.,
920 F.2d 446 (7th Cir. 1990) 10

Carbone v. International Ladies' Garment Workers' Union,
768 F.2d 45 (2nd Cir. 1985) 10, 11

Delaware State College v. Ricks,
449 U.S. 250, 258, 66 L.Ed.2d 431, 439,
101 S.Ct. 498 (1980) 5, 6, 7, 8

Granfinanciera, S.A. v. Nordberg,
492 U.S. 33, 38, 109 S.Ct. 2782, 2788,
106 L.Ed.2d 26 (1989) 3

Heideman v. PFL, Inc.,
904 F.2d 1262, 1266 (8th Cir. 1990) 8

Irwin v. Veterans Admin.,
U.S. , 111 S.Ct. 453, 457, 112 L.Ed.2d 435
(1990) 7, 9, 10, 11, 12

Mull v. Arco Durethene Plastics, Inc.,
784 F.2d 284, 7th Cir. 1986) 10

Olson v. Mobile Oil Corp.,
904 F.2d 198, 201 (4th Cir. 1990) 10

Pike v. City of Mission, Kan,
731 F.2d 655, 659 (10th Cir. 1984) 9

Scheerer v. Rose State College,
950 F.2d 661, 665 (10th Cir. 1991),
cert. denied 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992) 9

Sozinsky v. U.S.,
300 U.S. 506, 514, 57 S.Ct. 554, 556,
81 L.Ed. 772 (1937) 3, 8

TABLE OF AUTHORITIES—Continued

Page

Washington v. Yakima Indian Nation,
439 U.S. 463, 476, n. 20, 99 S.Ct. 740, 749,
n. 20, 58 L.Ed.2d 740 (1979) 4, 5, 6

Whalen v. Unit Rig. Inc.,
974 F.2d 1248 (10th Cir. 1992),
cert. denied 113 S.Ct. 1417, 122 L.Ed.2d 787 (1993) 4

29 U.S.C. § 626(d) 6

No. 93-258

In The

Supreme Court of the United States

October Term, 1993

DR. PATRICIA SCHLOESSER,

Petitioner

v.

THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and DR. STANLEY C. GRANT

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF CASE

Respondents' disagree with petitioner's characterization of this case. Petitioners took the case to trial on three theories: (1) respondent discriminated against her on the basis of age in demoting petitioner; (2) respondent discriminated against petitioner on the basis of age by firing her and; (3) respondent retaliated against petitioner for raising the issue of age discrimination at her May 2, 1988, demotion meeting. In motions for summary judgment, directed verdict and judgment notwithstanding the verdict, respondent argued that petitioner's demotion claim was time-barred because the administrative complaint was filed well beyond

the statutory 300-day period. At trial the jury found for petitioner on her demotion claim and for respondent on the retaliation, willfulness and discriminatory claims.

The trial court, at each stage, found petitioner was entitled to an equitable tolling of the time period because the Secretary of KDHE, Dr. Stanley C. Grant, made alleged misrepresentations "with respect to her subsequent job." Tr.app. at 276-277. The Tenth Circuit found that petitioner had ample notice on May 2, 1988, to believe her demotion was the result of age discrimination. At the summary judgment phase and at trial petitioner presented evidence that Dr. Grant advised her in April, 1988, that he was unhappy with her work and gave his reasons for her demotion. Tr.app. at 64, 82, 208-210. On May 2, 1988, petitioner's attorney warned Dr. Grant that he could not base petitioner's proposed demotion on discrimination. App. at 82-83. Dr. Grant subsequently made a series of comments which petitioner and her attorney believed proved respondent had age-bias at the time of the May 2, 1988 meeting. App. at 83-84; Tr.App. at 211, 213. On May 2, 1988, petitioner and her attorney both knew she had been demoted. App. at 64-65; Tr.app. at 202-203, 213. Plaintiff did not file her EEOC complaint until June 19, 1989. App. at 67.

Petitioner was terminated for lawful reasons on May 9, 1989. Verdict, #3. At trial, she testified that all the bases for believing she was the victim of age discrimination occurred prior to May 2, 1988. App. at 90-91; Tr.App. at 214-215. At trial, petitioner unsuccessfully tried to prove that her termination was age-related based on promises Dr. Grant made on May 2, 1988, about her subsequent job. App. at 92-93; Tr.App. at 223-224. Petitioner unsuccessfully argued to the Tenth Circuit that these May 2, 1988, statements about her future position, to which she was demoted, tolled the time for filing her complaint about her demotion. The circuit disagreed.

REASONS CERTIORARI SHOULD BE DENIED

I. The United States Court of Appeals for the Tenth Circuit Properly Reviewed and Reversed the District Court.

A. Petitioner's Argument is raised for the First Time.

Nowhere in Petitioner's brief to the Tenth Circuit, or previously, did she argue the line of cases cited on pages 7-10 of her Petition for Writ of Certiorari to this Court ("Petition"). Nowhere in Petitioner's brief or oral argument to the Tenth Circuit did she argue that the ruling on summary judgment was "interlocutory," "strictly a pretrial order," or "limited and incomplete." Neither respondents nor the Tenth Circuit has seen these cases or this reasoning previously. Based upon longstanding precedent, this Court should deny the petition on this reason alone. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38, 109 S.Ct. 2782, 2788, 106 L.Ed.2d 26 (1989); *Sozinsky v. U.S.*, 300 U.S. 506, 514, 57 S.Ct. 554, 556, 81 L.Ed. 772 (1937). In fact, if petitioner had raised this argument before the lower court, assuming the reasoning has merit, the Tenth Circuit could have easily overcome such law by reversing the district courts' ruling on respondent's motions for directed verdict or judgment notwithstanding the verdict. (Now, Fed.R.Civ.P. 50, Judgment as a Matter of Law ["JAMOL"]). See below, § IB. Petitioner's belated argument illustrates the reason for the *Nordberg* rule: the lower court could have easily corrected any procedural infirmities in its decision; petitioner cannot resurrect her failed claim by asserting a new theory.

B. The 10th Circuit Ruling is proper on other grounds.

A second fatal failing in petitioner's arguments is that the Tenth's Circuit's decision can be upheld where there are other grounds upon which the court could have ruled in respondent's favor. A prevailing party "may, of course,

defend its judgment on any grounds properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or even the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n. 20, 99 S.Ct. 740, 749, n. 20, 58 L.Ed.2d 740 (1979). Respondents had also asked the Tenth Circuit to reverse the district court's rulings on its motions for directed verdict and judgment not withstanding the verdict (j.n.o.v.). Respondents' arguments and proof under summary judgment, directed verdict and j.n.o.v. are almost identical. In fact, as petitioner recognizes, the Tenth Circuit relied in part, in its decision, on facts that were presented at trial, rather than in summary judgment briefs. *See* Petition, at 13-14. However, the Tenth Circuit's reasoning and grounds for its ruling are still, simply, that petitioner knew of her demotion on May 2, 1988, knew of the consequences of her demotion on or shortly after May 2, 1988, and had a firm belief of age-bias on May 2, 1988. The three-hundred day time period began to run.

Petitioner's newly raised cases include *Whalen v. Unit Rig. Inc.*, 974 F.2d 1248 (10th Cir. 1992), *cert. denied* 113 S.Ct. 1417, 122 L.Ed.2d 787 (1993), in which the court states:

> We now hold that even if summary judgment was erroneously denied, the proper redress would not be through appeal of that denial but through subsequent motions for judgment as a matter of law ("JAMOL") and appellate review of those motions if they were denied. 974 F.2d at 1251.

Respondent duly raised the timeliness issue in its Rule 50 JAMOL motions, relied on the same facts and caselaw as in its motion for summary judgment, and sustained unfavorable rulings from the district court on the same basis. At each stage the district court agreed with petitioner that statements made about a subsequent job can toll time deadlines for a recognized demotion. The Tenth Circuit disagreed with this reasoning and these rulings. The ve-

hicle the circuit chose for reversing the case was the summary judgment order. The Court could have reversed either the order on directed verdict or j.n.o.v. and reached the same point, that is, petitioner's demotion claim was untimely as a matter of law. *Washington*, 439 U.S. at 476, n. 20.

C. The Court of Appeals Used the Correct Standard of Review.

1. The Court of Appeals did not Substitute Itself for the Trier of Fact.

Petitioner claims a material factual dispute exists as to whether her new job was "important" and whether Dr. Grant had "discriminatory intent when he demoted her." The Tenth Circuit found, as a matter of law, neither of these facts is relevant to equitable tolling or estoppel. Whether petitioner's job following her demotion was important, had clerical support, a large office, or adequate responsibilities are not factors which can toll the demotion time limits. The Tenth Circuit looked at petitioner's own testimony and her admitted knowledge as of May 2, 1988. Petitioner and her attorney undeniably knew she was demoted and believed the demotion decision was age-based. An adverse employment action taken for allegedly discriminatory reasons triggers the ADEA time periods. *Delaware State College v. Ricks*, 449 U.S. 250, 258, 66 L.Ed.2d 431, 439, 101 S.Ct. 498 [1980]. Respondent's ultimate "intent" or the true "importance" of plaintiff's new job are evidence of other issues (e.g. retaliation, discrimination in termination), not evidence of equitable tolling or estoppel. The court used the correct legal standards.

2. The Court of Appeals Correctly Applied the Facts.

It is undisputed petitioner was demoted on May 2, 1988, and she knew it. The Circuit recognized additional facts, adduced at trial, by which petitioner suffered the further

consequences of her demotion - e.g. reduced pay, less office space, diminished clerical support. The court stated petitioner suffered these consequences "immediately" and petitioner argues that some conditions of her new job were not realized for three to five months. Again, such facts are irrelevant to the applicable law and the court's decision remains well-founded. *Ricks*, 449 U.S. at 258. The terms and conditions of her new job, however or how quickly they deteriorated, did not change the fact of petitioner's demotion, her knowledge of the demotion and her belief that discrimination occurred. Even if the court used the term "immediately" for an event that occurred in October or even if the court cited a fact developed at trial, the court's conclusion remains the same. *Washington*, 439 U.S. at 476, note 20.

D. Conclusion.

Petitioner raises caselaw and arguments for the first time in her Petition. She also ignores long-held law that a decision stands when it is founded on issues previously raised, even if the court of appeals decided the case on different grounds. No factual or procedural error by the Tenth Circuit, even assuming any exists, alters the decision. Petitioner's demotion claim was time-barred for failure to file a timely EEOC complaint, even after she suffered a demotion which she believed to be discriminatory. This Court has no reason to review or reverse the Tenth Circuit Court of Appeals.

II. No Conflicting Law Among the Circuits Exists on the Law Concerning Federal Limitations Periods in Determining Whether an Employee may Assert Equitable Modification when an Employee's Claim is Time-Barred Pursuant to 29 U.S.C. § 626(d).

Any confusion which petitioner creates on the equitable modification issue can be explained in one of two ways:

(1) Caselaw Terminology - most courts articulate the two doctrines of equitable tolling and equitable estoppel, however, *all* courts apply similar principles regardless of what nomenclature is used; (2) Petitioner's Terminology - Petitioner has, throughout this case, confused the two terms, which was recognized by the Tenth Circuit in its discussion of equitable tolling and estoppel. Tenth Circuit Order and Judgment ("Order") fn 1. Any such confusing distinctions by petitioner are irrelevant to the court's substantive ruling.

A. The Tenth Circuit Followed Existing Precedent.

The United States Supreme Court has admonished that procedural requirements for gaining access to courts should be strictly adhered to and not disregarded out of a "vague sympathy for a particular litigant." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 80 L.Ed.2d 196, 202, 104 S.Ct. 1723 (1984). More recently the Court reasserted, "[F]ederal courts have typically extended equitable relief only sparingly." *Irwin v. Veterans Admin.*, U.S. , 111 S.Ct. 453, 457, 112 L.Ed.2d 435 (1990). The Court in *Irwin* defined the parameters of equitable tolling as follows:

> We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. (citations omitted) 111 S.Ct. at 460.

In discrimination actions this Court has held the applicable statute of limitations period accrues when the adverse employment decision is made and communicated to the employee (*Delaware State College v. Ricks*, 449 U.S. 250, 258, 66 L.Ed.2d 431, 439, 101 S.Ct. 498 [1980]), regardless of

when the ultimate consequences of the decision are felt. *Id.*

Petitioner urges this court to grant certiorari on the basis that the Tenth Circuit analysis erroneously employed equitable tolling principles, rather than equitable estoppel. Once again, petitioner is raising an issue for the first time in her Petition to the Court. *Sozinsky,* 300 U.S. at 514. In all previous responses, briefs and arguments petitioner has urged the courts to "toll" the statute of limitations period because Dr. Grant misstated the contours of her new job. *See,* "Order," fn 1. The circuit court rejected petitioner's tolling argument, as well as any estoppel bases for her claim. *Id.* Startlingly, petitioner argues that under the Tenth Circuit's analysis employees would no longer be able to rely on an employer's statement that, its actions are not discriminatory. Petition, p. 19. This is an irrelevant assertion. "No employer is likely to admit . . . a flagrant violation of a federal law against discrimination . . . *Heideman v. PFL, Inc.,* 904 F.2d 1262, 1266 (8th Cir. 1990). Petitioner also criticizes the Tenth Circuit order because, now, "any type of job change which could be construed as a 'demotion' or lesser job . . . would set in motion the [ADEA] time clock." Petition, p. 19. This is rightly so under *Ricks* and all limitations principles.

The Tenth Circuit recognized that petitioner undisputably had all the elements necessary to timely file her EEOC complaint on or shortly after May 2, 1988. Dr. Grant made no promises about restoring petitioner to her past status or about settlement negotiations, so petitioner was not estopped from asserting the timeliness issue. Statements about petitioner's new position involved a separate job action—i.e. the eventual elimination of her job. Under these circumstances, and under either equitable theory, petitioner was not entitled to sit on her claim until some unidentified future point in time, then assert that time deadlines do not apply to her.

B. The Previous Tenth Circuit Standard

All previous Tenth Circuit equitable tolling cases involved actively misleading statements about plaintiff's procedural rights. *Scheerer v. Rose State College,* 950 F.2d 661, 665 (10th Cir. 1991) *cert. denied* 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992). One Tenth Circuit case examined fraudulent concealment by the employer and found, even if federal law applies (rather than state law), the employer's bad acts must result in the employee's ignorance of his claim. *Pike v. City of Mission, Kan,* 731 F.2d 655, 659 (10th Cir. 1984). This reasoning is consistent with the circuit's analysis of petitioner's arguments.

In the present case the Tenth Circuit expanded its previous holdings and applied equitable estoppel, as well as equitable tolling when the employer allegedly made misrepresentations about nonprocedural matters. The court also adhered to the warnings issued in *Baldwin County;* had the Tenth Circuit adopted petitioner's equitable relief notions, no certainty would any longer attach to time deadlines. As long as one subsequent promise remained unmet, employers would risk being sued long past their known adverse job decisions. Here, the Tenth Circuit followed equity principles and expanded its own guidelines in examining petitioner's claims.

C. Decisions in other Circuits.

No split among the circuits exists as to the substantive law on equitable modification. Moreover, equitable tolling has been defined, once again, by this court in the *Irwin* case. All courts recognize that where an employer misleads an employee as to whether she has a cause of action under the ADEA, time deadlines can be waived. No court in any circuit has held, however, that the statute of limitations can be tolled or the employer estopped from asserting it as a defense where, as here, the employee knew a discrete, adverse action had taken place, heard various age-based

statements during her demotion meeting and hired an attorney to protect her rights under the ADEA and Title VII. At that point the time deadlines accrued. *See Olson v. Mobile Oil Corp.*, 904 F.2d 198, (4th Cir. 1990) (Plaintiff's argument that defendant concealed operative facts is "undercut" by his awareness of his cause of action and "it hardly seems equitable to toll a limitations period when the employee concededly possessed the information necessary to file a timely discrimination charge." *Id.* at 201); *Mull v. Arco Durethene Plastics, Inc.*, 784 F.2d 284, (7th Cir. 1986) (Employee's knowledge of adverse employment decision ". . . made his reliance on defendants' alleged misleading actions an impossibility. Equitable estoppel is, therefore, unwarranted, here." *Id.* at 292).

Petitioner cites the Seventh Circuit case of *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990) to define her newly-asserted equitable estoppel/fraudulent concealment argument and to create a "split" in the circuits. *Cada* offers her no relief on either front. *Cada's* fraudulent concealment concept provides relief until plaintiff discovers - or should have discovered - her injury. *Id.* at 451. Certainly, Petitioner knew on May 2, 1988, she was injured. The *Cada* court cites *Carbone v. International Ladies' Garment Workers' Union*, 768 F.2d 45 (2nd Cir. 1985) to illustrate a possible error in reasoning by the Second Circuit. The *Carbone* court appears to require employer action to invoke equitable tolling. However, the *Irwin* case has redefined equitable tolling and thereby clarified the parameters of the doctrine. Although not relevant to the *Carbone* holding or to the present case, after *Irwin* it is clear equitable tolling may be invoked regardless of employer conduct. The Second Circuit must now follow *Irwin*; any discrepancy between the circuits is, therefore, moot. The Tenth Circuit assumed Dr. Grant may have misstated petitioner's new position, and petitioner now urges equitable estoppel, not tolling, be applied to

her circumstances. The *Carbone* holding is not even applicable to these facts.

The Fifth Circuit in *Blumberg v. HCA Management Co., Inc.*, 848 F.2d 642 (5th Cir. 1988), the case which the Tenth Circuit cites and follows, recognizes both equitable doctrines and follows the *Irwin* case. *Id.* at 645. The *Blumberg* court rejects estoppel where plaintiff could and did evaluate the propriety of the reasons for her termination; again, the employer cannot mislead an employee by denying he had discriminatory intent. Knowledge of her claim at the time of discharge is the key factor under either doctrine. *Id.* at 645. The Tenth Circuit thereby followed the Supreme Court and all relevant precedent from other circuits in its order.

CONCLUSION

Based upon undisputed facts, the Tenth Circuit found that petitioner had all the information she needed to file her claim on May 2, 1988, or within the 300 days thereafter. Discussions about the conditions of her subsequent job did not toll the statutory time period. The circuit followed *Irwin* and all existing precedent to reach its conclusion. There is no split among the circuits under these facts; the case plaintiff cites to create a circuit split has been subsequently overruled, in part, by *Irwin*. Petitioner is not entitled to equity under either doctrine where she failed to "exercise due diligence in preserving her legal rights." *Irwin*, 111 S.Ct. at 460.

Respectfully submitted,

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